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No. 15,645 ✓

**United States Court of Appeals
For the Ninth Circuit**

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANTS' OPENING BRIEF.

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FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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No. 15,645

United States Court of Appeals For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANTS' OPENING BRIEF.

I. JURISDICTION.

This appeal is from a judgment in favor of the United States of America rendered in the United States District Court for the Northern District of California, Southern Division, in an action brought by appellants pursuant to provisions of U.S.C. Title 28, Section 1346(a)(1), for the refund of income taxes alleged to have been erroneously paid, collected and retained by appellee (R. 13-15).

The complaint alleged jurisdiction pursuant to U.S.C. Title 28, Sec. 1346(a)(1) (Supp. R. 383, Paragraph I).

Appellants Harold M. Koch, William L. Koch, Maurice P. Koch and Rebecca Koch Abel are partners in the firm of Koch & Sons, and appellants Bessie Koch, Rose Koch and Daisy Koch are respectively the spouses of the three appellants first named. Each appellant filed separate income tax returns for the years in issue.

Judgment was entered on January 23, 1957 (R. 13-15). A motion for new trial was filed February 1, 1957 (R. 21, 22), and an order denying said motion was made March 5, 1957 (R. 22). Notice of appeal to this Honorable Court was filed with the District Court on April 18, 1957 (R. 32) pursuant to the provisions of Sections 1291 and 1294(1) of 28 U.S.C. and within the time provided by Rule 73(a) of Federal Rules of Civil Procedure, 28 U.S.C.

II. STATUTES INVOLVED.

The pertinent portions of the Revenue Code involved, and in effect at the time in question, are as follows:

1939 I.R.C. Section 23.

“Deductions from Gross Income.

“In computing net income there shall be allowed as deductions: . . .

“(e) Losses by Individuals. In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

“(1) if incurred in trade or business;

“(k) Bad Debts.

“(1) General rule. Debts which become worthless within the taxable year; . . . This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.

“(4) Non-business debts. In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term ‘non-business debt’ means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer’s trade or business.

“(s) Net Operating Loss Deduction. For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.”

The pertinent portions of I.R.C. 122 relating to carry-back to previous taxable years of losses subsequently incurred are as follows:

“Sec. 122. Net Operating Loss Deduction.

“(a) Definition of Net Operating Loss. As used in this section, the term ‘net operating loss’

means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

“(b) Amount of Carry-Back and Carry-Over.

“(1) Net operating loss carry-back.

“(A) Loss for taxable year beginning before 1950. If for any taxable year beginning after December 31, 1941, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years. . . .

“(d) Exceptions, Additions, and Limitations. The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

.

“(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business.”

III. STATEMENT OF CASE.

This action involves a determination as to whether or not the losses incurred by taxpayers in the year 1947 were deductible as losses incurred in the taxpayers' trade or business as provided in 1939 I.R.C. Sec. 23(e)(1) or Sec. 23(k)(1), and in the operation

of their business within the meaning of the "carry-back" provisions of 1939 I.R.C. Sec. 122.

1. The Pleadings.

The complaint alleged, in separate counts for each of the partners and their respective spouses, a loss in the year 1947 attributable to a business carried on in that year. (S.R. 389, paragraph VI; S.R. 393, paragraph VI; S.R. 397, paragraph VI; S.R. 401, paragraph VI; S.R. 404, paragraph VI; S.R. 409, paragraph VII; S.R. 413-414, paragraph VII).

The answer admits that the total sum of \$90,000.00 was expended and resulted in loss in the year 1947; however, the answer alleges that the loss was a non-business bad debt and therefore requires tax treatment as a capital loss. (S.R. 417, paragraph 6; S.R. 418, paragraph 12; S.R. 426, paragraphs 2 and 5).

2. The Trial.

All motions, issues and facts were determined by the Court, except that by stipulation (R. 293), a single special interrogatory was submitted to the jury, to-wit:

"During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?"

3. Fact Pattern.

Three brothers and a sister, members of the Koch family, entered into a partnership agreement on December 31, 1941 (Appendix A, Exhibit 1, R. 35), under the firm name of H. Koch & Sons. Although

the partnership originally conducted a luggage business previously conducted by the father of the partners, the agreement was amended on October 23, 1944 to provide that the partnership would engage *in the business of financing motion pictures* (R. 35, 36, Exhibit 2; portions reprinted in Appendix B).

4. Theories Upon Which the Cause Was Presented.

A. Plaintiffs' theory upon trial of the cause was two-fold: Firstly, that they acted pursuant to their formal partnership agreement (Appendix B) to engage *in the business of financing motion picture ventures*, and that they were so engaged when the loss occurred and are therefore entitled to the deductions provided by 1939 I.R.C. Sections 23(e)(1) or 23(k)(1) and Section 122 as a matter of law; and

Secondly, that the motion picture financing transaction which resulted in loss was not an isolated transaction, and plaintiffs offered proof of extensive activities in similar motion picture financing transactions during the period in question, and urged that time and effort expended in said business should be considered with respect to all transactions and whether or not the same resulted in concluded financing agreements.

B. The Government's theory of the case, in which it was largely supported by the trial Court, was: That only actual investments which were concluded during the exact period in question should be considered in determining whether or not the partnership was engaged in such business, and that the extensive nego-

tations and time and effort spent in the business which did not result in actual concluded financing within the exact limits of the year in question, were to be disregarded.

IV. QUESTIONS PRESENTED.

1. Charge to the jury: Did the trial Court err in giving instructions contrary to the law, in its failure to give properly requested instructions necessary to a determination of the cause, and in failing to give any properly requested instruction upon plaintiffs' theory of the case?

2. Directed verdict: Was the trial Court in error in granting a dismissal or directed verdict (as the case may be) with regard to part of the relief sought, and particularly when the erroneous ruling affected all other considerations in the cause?

3. Evidence: Was the trial Court in error in its rulings with regard to the admission and rejection of evidence?

4. Findings: Are the findings supported by the pleadings, the evidence, and the stipulations of the parties?

5. Conclusions: Did the trial Court erroneously determine the law applicable to the particular facts and issues presented?

6. Sufficiency of evidence: Is the judgment supported by the evidence?

7. Argument of counsel: Were plaintiffs prejudiced by the misconduct of counsel which misled and inflamed the jury and by reason of which plaintiffs were prevented from having a proper deliberation by the jury?

V. SPECIFICATIONS OF ERRORS.

A. ERRORS IN THE CHARGE OF THE COURT TO THE JURY.

(1) The trial Court instructed:

“If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf and not on behalf of H. Koch & Sons, that transaction cannot be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures.”
(R. 302.)

Exception was taken (R. 311, 312). The trial Court had granted a directed verdict (or dismissal) against Maurice P. Koch upon the basis that there was no evidence that he had ever acted in his own behalf, and that all of the evidence and the agreement of the parties conclusively established that all of his acts were on behalf of the partnership (R. 292). After Maurice P. Koch was thus put out of the case, the Government argued the “Janus-faced” plea to the jury that the activities were all the personal activities of Maurice P. Koch in his own behalf and not in behalf of the partnership (R. 353, 354). There was

no theory of fact in the case as a basis for the instruction. The instruction compounded the error of the Court and the prejudicial remarks of counsel.

(2) After extensive evidence was received upon the issues the Court instructed the jury:

“There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion pictures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner’s determination by proving by a preponderance of the evidence that they were engaged in the trade or business of financing motion pictures.” (R. 301-302.)

This instruction was further impressed by the Court’s statement to the jury as follows:

“Thereafter the Commissioner of Internal Revenue *made a determination* that the loss incurred by H. Koch and Sons was not as the result of a business bad debt but that the loss occurred by reason of a nonbusiness bad debt.” (R. 298.)

We acknowledge, with apology, that the record does not contain the argument and authorities submitted upon this subject, except that during defense counsel’s argument to the jury (R. 343, 344), and before the Court instructed the jury, plaintiffs objected to the proposition propounded by the instruction, and the ends of justice require consideration of the fatal error involved. Under the decisions of this Honorable

Court, the Commissioner's determination merely shifts the burden of going forward, and once there is evidence, the cause must be decided "upon the evidence and upon the evidence alone." (Note: The trial Court's own findings are based on the alleged "presumption.")

(3) The trial Court failed to give to the jury any one of the instructions properly requested by the plaintiffs upon plaintiffs' theory of the case as follows:

"That in determining whether or not H. Koch & Sons was engaged in the business of financing motion picture ventures, you must consider, among other things, the amount of time and effort expended in that direction, and such time and effort, if any, must be considered by you whether or not an actual venture was concluded."

"That in considering the activities of H. Koch & Sons with relation to the business of financing motion picture ventures, you must consider all activities designed to advance the financing of such projects and you must consider the same whether or not the transactions were actually concluded."

"That in considering the question as to whether or not H. Koch & Sons devoted substantial time to the financing of motion picture ventures you are required to consider all of their activities relating to that purpose, and all activities and efforts actually expended in attempting to negotiate for and in attempting to enter into financial transactions relating to the business of financing motion picture ventures must be considered by you upon this issue, whether the same were concluded or not." (R. 25 and 26.)

Exceptions were taken for the failure to give any one of these instructions (R. 31). The jury was left with the impression that "financing" means paying out money and that all time, efforts and transactions in which actual funds were not disbursed were to be disregarded. The requested instructions express the law and plaintiffs' entire theory of the case.

(4) The trial Court failed to give any one of the instructions properly requested by plaintiffs as follows:

"In order for one to be regularly engaged in the conduct of a particular business, it is not necessary that he devote a major part or any particular part of his time and efforts to such business. Neither is it necessary that he devote a major portion or a particular portion of his capital to such business in order for it to be deemed to be a business regularly carried on by such taxpayer. . . . etc." (R. 23-24.)

"A taxpayer may be deemed to be regularly engaged in the conduct of a particular business even though he may devote most of his time, efforts, and capital to another business or other businesses." (R. 24.)

"That if you should find that H. Koch & Sons, acting through one or more of its partners, or acting through persons, firms, corporations or representatives appointed by said partnership, has regularly and continuously participated in the promotion and financing of motion picture ventures during the year 1947, then you must find that H. Koch & Sons was engaged in the business of financing and promoting motion pic-

ture ventures and that said business was regularly conducted.” (R. 25.)

In the absence of these instructions, as well as any instruction relating to plaintiffs’ theory of the law of the case, the jury remained uninformed with regard to any basis upon which it could predicate an answer in favor of plaintiffs.

B. ERRORS OF LAW.

(1) The Court erred as a matter of law in its interpretation of the copartnership contract of the parties (Exhibit 2, Appendix B), and further erred by reason thereof in granting a directed verdict (or partial dismissal) with regard to the claims of Maurice P. Koch and his wife, Daisy Koch.

(2) The trial Court erred in granting a directed verdict (or partial dismissal) with respect to the plaintiffs Maurice P. Koch and Daisy Koch.

C. ERRORS WITH RESPECT TO THE ADMISSION AND REJECTION OF EVIDENCE.

(1) The Court erred in its failure to admit into evidence Exhibit 5 for identification (Appendix D) (the contract between one Coslow and United Artists Corporation for the production and world-wide distribution of a feature film, and providing that Coslow must be the controlling stockholder of the corporation producing same). The loss in question (\$90,000.00)

occurred in activating said corporation and in the advancements made for the pre-production costs of the film contemplated by the agreement. The document was finally excluded upon the ground that it had no bearing on the issues of the case.

This document was offered and rejected several times. It was first objected to on the ground that no foundation was laid (R. 46). The foundation was laid (R. 210-212), whereupon the Court refused to admit the document (R. 212). Document offered again and the Court could not find the name of the plaintiffs in the document and refused to permit counsel to explain the interest and beneficiary position of plaintiffs in this agreement (R. 213-214).

(2) The Court erred in its failure to admit into evidence Exhibit 19 for identification (Appendix E) (an unsigned document negotiated to set up a venture for the financing and production of a series of films between plaintiffs and several well known creative persons in the film industry).

The document was offered for the purpose of showing the activities of the plaintiffs in the business of financing motion picture ventures, to show the time and effort expended in negotiations, and as a physical fact indicating efforts expended at the very time in question (R. 79-81), and as a key to the time, effort and expenses incurred. The offer was renewed (R. 84-85) and the purpose clearly demonstrated.

Objection was made on the ground that the document was prepared in the name of the partnership's

wholly owned corporation, Ambassador Productions, and not in the name of the partnership (R. 85). The Court refused admission on its own objection that the document was not executed, i.e., that the actual advancement of funds was not consummated (R. 85).

(3) The Court erred in its failure to admit into evidence Exhibit 21 for identification (Appendix F) (an unexecuted agreement between one of the partnership's wholly owned corporations and Alfred E. Green, dated April 28, 1947, providing for the employment by said corporation of Alfred E. Green in the capacity of director and producer for a series of films over a period of three years). This was also offered to show time expended, and refused because not executed. Objection was made on the ground that the agreement was not with plaintiffs but with their wholly owned corporation. The Court sustained the objection only upon its own objection that the document was not executed (R. 84-85).

(4) The Court erred in its failure to admit into evidence Exhibit 26 for identification (Appendix G), which is the unexecuted contract negotiated in the period in question between Monogram Pictures Corporation and Ambassador Productions, Inc. (plaintiffs' wholly owned corporation) for the financing, production and distribution of a series of films, together with a letter dated September 25, 1947, from Monogram Pictures Corporation to the attorneys for the partnership.

The document was evidence of the time, effort and expenditures incurred in negotiations for a series of

films at the exact time in question. Objection was made that no foundation was laid; and the Court refused admission on the ground that the document was not executed (R. 99-100). Stipulation covered foundation in so far as preparation and receipt of documentation was concerned (R. 99); however, the Court excluded the same upon the ground that the agreement was not executed and concluded (R. 100).

(5) The Court erred in its failure to admit into evidence Exhibit 29 for identification (Appendix H). This exhibit was offered to prove that negotiations for the financing of a series of films to be produced by Monogram Pictures, commenced in September, 1947, were still under way on November 19, 1947 (the period in question). Objection was raised on the ground that the letter from Monogram Pictures was addressed to the attorney for the partnership, who also formed and happened to be a director, with his co-counsel, of the partnership's wholly owned corporation, Ambassador Productions, and upon the ground that there was no showing which of the capacities of the attorney applied in the receipt of this letter (R. 107-108). The Court sustained the objection upon this ground, although the record is completely clear that counsel were acting for the partnership at all times (R. 78, 88-89, 109, 124).

(6) The Court erred in its failure to admit into evidence the check payable to Apex Film Corporation, dated January 26, 1948, and evidence of the details of advances made thereafter. Although the loss in

question occurred in the year 1947 and the transaction for the financing of this large series of films was conducted in 1947 the funds were not advanced until January, 1948. The Court refused to admit the detail evidence of actual funds advanced in 1948 pursuant to arrangements made in 1947 (R. 128-130) although the Court previously ruled, in effect, that only concluded transactions and funds actually advanced were to be considered, and likewise had ruled that only the details of transactions would be admitted (R. 60, 245-246).

(7) The Court erred in refusing Exhibit 24 for identification (Appendix I) (a letter from Annie Laurie Williams, dated October 17, 1946, opening the negotiations for "Hill of the Hawk" by Scott O'Dell).

The letter was admittedly received by counsel for plaintiffs in motion picture transactions (R 92). The Court refused to admit this correspondence showing the commencement of this project which continued as a major activity throughout the entire period, on the grounds of "hearsay" (R. 92-95). The letter was not offered to prove the truth of its contents. It was offered to prove activity.

(8) The Court erred in sustaining objection to testimony offered to show the quantum of time and effort expended in picture transactions.

The Court refused to permit testimony with regard to the number of transactions and the amount of time and effort expended on the grounds of "vague, speculative, and calling for the opinion and conclusion

of the witness". Mr. Koch was asked how many different deals were looked into over a six month period. Defense objected on the grounds, vague and speculative, calling for the opinion and conclusion of the witness. The Court stated,

"I think in view of the objection he would have to give the individual contacts" (R. 60).

(9) During the course of taking testimony of a disinterested witness who had been present at almost all negotiations, the Court similarly erred in sustaining objection as follows (R. 245-246):

"Q. (By Mr. Fink.) So far as *your own personal knowledge is concerned*, with regard to the year 1947, approximately what part of Mr. Koch's time did he spend in connection with motion picture activities?

Mr. Gillard. I object to that as calling for the opinion and conclusion of the witness.

The Court. Sustained." (Emphasis ours.)

(10) Although defendants made proof that plaintiffs sold out certain assets some years later, the Court refused to permit testimony to prove that plaintiffs went out of the motion picture financing business only after some years following the time in question (R. 181-182), on the erroneous ground that the question making inquiry as to when they went out of this business called for the conclusion of the witness.

D. SPECIFICATION OF ERRONEOUS FINDINGS.

(1) Finding No. 5 (R. 8) that H. Koch & Sons were in the luggage business is erroneous, confusing and misleading in light of consideration of Finding No. 2 (R. 8). Finding No. 2 determines that the formal agreement of the parties executed in 1944, was in full force and effect at all times and provided that the partnership would engage in the business of financing motion picture productions; whereas Finding No. 5 determines that the partnership was *only* in a different business contrary to the contract and acts of the partners.

(2) The complaint alleges and the answer admits losses in the total sum of \$90,000 and not \$75,000 as found in Finding No. 6 (R. 8-9). (S.R. 385, paragraph VI; S.R. 405, paragraph II; S.R. 417, paragraph 6; S.R. 426, paragraph 2). The finding is likewise erroneous in that the said finding and the findings as a whole do not dispose of the loss sustained by Maurice P. Koch (and his wife, Daisy) of amounts contributed pursuant to the partnership agreement in excess of the participation by the other partners. This finding also fails to show that the partnership was in fact the largest owner of interest in the film. The finding is not supported by the evidence.

(3) Finding No. 8 (R. 9) assumes that the plaintiffs are bound by the findings of the Collector of Internal Revenue. Such a presumption or inference is a mere rule of evidence or of "going forward" and disappears upon the introduction of evidence. Here

we have the glaring error of the trial Court in making a finding based upon an alleged presumption; whereas this Honorable Court has repeatedly held that the "presumption" disappears upon the introduction of evidence, and that when evidence has been introduced, determinations must be made upon the evidence and upon the evidence alone.

(4) The Court erred in Finding No. 9 (R. 10) that the loss resulted from a non-business bad debt. This finding is not supported by the evidence. The finding is erroneous in that the ultimate fact to be found by the Court is whether or not the loss incurred was *attributable to the operation of a trade or business conducted by the plaintiffs* (1939 I.R.C. Sec. 23 (e)(1), Sec. 23(k)(1), Sec. 122(d)(5)).

(5) The Court erred in its Finding No. 10 (R. 10) to the effect that Maurice P. Koch was not engaged in the business of financing motion picture ventures. He was thus engaged pursuant to the express terms of the partnership agreement and all his acts were conducted as manager of the partnership business.

(6) Findings Nos. 11 and 12 (R. 10) find that by stipulation of the parties all of the salient and ultimate issues were withdrawn prior to submission of the case to the jury. No such stipulation was made and no issues were withdrawn. Only one special interrogatory was agreed upon and the parties carefully preserved by stipulation that all other facts and issues would be passed upon by the Court (R. 293). These findings also incorrectly interpret the allegations of the complaint.

The ultimate issue of fact in the entire cause is the determination as to whether or not the loss incurred was attributable to the operation of a trade or business. Findings 11 and 12 are only an attempt to hurdle the requirement of a finding on this, the ultimate issue of fact in the case, by substituting or adding stipulations which were not made, and by erroneous interpretation of the complaint.

(7) Finding No. 12 (R. 10, 11). The Court finds that a stipulation was made that limited plaintiffs' basis of recovery. No such stipulation was made and the record demonstrates the contrary (R. 293). The only interrogatory upon which the parties could agree was as quoted; however, the stipulation clearly preserved the duty of the Court to pass upon all other questions of fact, as well as law, and the duty of the Court to resolve all of the ultimate issues in the case.

(8) The Findings as a whole are erroneous in that they fail to find upon the ultimate fact in the case, to wit: Was the loss incurred "attributable to the operation of a trade or business?"

(9) The Findings as a whole are in error because they are based upon alleged stipulations which were not in fact made.

(10) The Court erred in its failure to make a finding as proposed by plaintiffs' number 4 (R. 17):

"The said Maurice P. Koch was entitled to share proportionately to the extent of the sum of \$75,000 contributed by the partnership and entitled to a separate share for the additional funds advanced by him and which were not matched by the remaining partners."

E. ERRONEOUS CONCLUSIONS OF LAW.

(1) Conclusion No. 1 (R. 11) is in error in that the Court concluded that the loss was not incurred in the trade or business of H. Koch & Sons. Proper interpretation of the agreement and acts of the parties (Ex. 2, Appendix B) requires the conclusion that the loss was incurred in the trade or business of H. Koch & Sons. The conclusion is erroneously based upon the Court's finding in accordance with an alleged "presumption" that the Commissioner of Internal Revenue had made a correct determination.

(2) Conclusions of law Nos. 2, 3, 4, 5, 6 and 7 and each of them (R. 9-10) are in error for reasons as follows: (i) The same are based upon findings which are not supported by the evidence; (ii) The same are based upon stipulations which are non-existent and which are contrary to all intendments of the record; (iii) The same are erroneous because they are contrary to an appropriate legal interpretation of the written agreement of the parties; (iv) The same are contrary to the content, allegations, admissions and issues as framed by the pleadings; (v) They are based upon an alleged presumption favoring the Commissioner which erroneously survived all evidence in the cause; (vi) The Conclusions as a whole fail to conclude the law upon the ultimate legal issue in the case, to wit, Was the loss involved attributable to the operation of a trade or business?

F. THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE.

The evidence is susceptible to only one reasonable interpretation, to-wit, that appellants' loss was incurred in the course of activities attributable to the operation of their business. The judgment is based upon stipulations, assumed and which do not exist, upon improper findings and erroneous conclusions. The judgment is based entirely upon an erroneous concept of the effect of the alleged "presumption" of correctness of determinations by the Commissioner of Internal Revenue. Once the several decisions and rules of this honorable Court are applied, the alleged presumption must fall, leaving all of the evidence overwhelmingly favoring plaintiffs.

G. PLAINTIFFS' CAUSE WAS PREJUDICED BY MISLEADING AND INFLAMMATORY STATEMENTS MADE BY COUNSEL FOR THE RESPONDENT.

The prejudicial and inflammatory statements by counsel for defendant caused a miscarriage of justice. Statements that this was plaintiffs' second crack at the case because plaintiffs had already lost the case once before the Commissioner; that plaintiffs' counsel were merely laying down a smoke screen, etc., and these statements being made by a representative of the people could hardly make for justice.

VI. ARGUMENT.**A. THE FACTS.**

Appellants, Maurice P. Koch, Harold M. Koch and William L. Koch, were brothers, and appellant

Rebecca Koch Abel is their sister. The remaining appellants are the respective wives of the brothers. On December 31, 1941, the brothers and sister formed a partnership (R. 35, Ex. 1, Appendix A), under the style of H. Koch & Sons. The partnership became the successor to a luggage manufacturing business previously conducted by the father of the partners (R. 45). The brothers Harold and William were shop workmen, Rebecca kept the books, and Maurice (also referred to as Murray) (R. 266) was the general manager and so-called "boss" or "outside man" (R. 266). He received special compensation and privileges (Ex. 1, Appendix A) and was completely in charge (R. 44, 45) to the extent that partnership dealings and written documents were quite often in his own name (R. 72, 76). Pursuant to agreement (Ex. 2, Appendix B) all documentation in the picture business was drafted in the name of Maurice P. Koch and the partnership style is not mentioned (Plaintiffs' Ex. Nos. 10, 12, 14, 16, 17 in evidence, Appendix K, L, M, N and O, respectively). The funds, which were admittedly lost, were disbursed from the partnership upon checks generally signed by Rebecca, and at times by Maurice (Plaintiffs' Ex. Nos. 6, 8, 10A and 13 in evidence, Appendix P, Q, R and J, respectively). It was clearly established that all references to Maurice P. Koch refer to the partnership (R. 43, 101); that whenever Maurice refers to "my people" he is referring to his partners (R. 56, 57); that he executed the documentation on behalf of the partnership, although the same was in his own

name (R. 72); that although he was expressly authorized in writing to conduct the transactions in his own name, there was also a practice to use his name instead of the name of the partnership (R. 76); that when he organized corporations to further the motion picture investment projects, he was at all times acting and signing on behalf of the partnership although his own name appeared (R. 96, 97). During all of the times mentioned, and throughout all motion picture transactions, Maurice acted for, and only on behalf of, H. Koch & Sons, a copartnership (R. 112); although stock of corporations engaged in motion picture activities stood entirely in his name, the stockholder was in reality the partnership (R. 122, 123, 124); in addressing Maurice in the record or otherwise, the use of the word "you" indicated H. Koch & Sons (R. 101, 125); and the attorneys engaged for picture purposes in fact represented H. Koch & Sons (R. 78, 88-89, 109, 124, 191).

Maurice P. Koch's lifetime associations, friendships and relationships were in the motion picture business (R. 37). In 1944 the activities of H. Koch & Sons were quite limited, and generally related to the luggage business (R. 267). Competition was extremely keen and the future appeared bleak for that industry (R. 181).

The decision of the partnership to engage in the business of financing motion pictures is fully confirmed by two formal documents both bearing date of October 23, 1944, some three years prior to the particular loss in question, as follows:

(1) The written amendment to the partnership agreement (Ex. 2, Appendix B), which provides that the partnership will engage in the business of financing motion picture ventures by each and every means, and that all partnership resources be available to this purpose.

(2) On the same date upon which this partnership agreement was entered into, the partners formed "Producers Syndicate" (R. 36, 37, Ex. No. 3, pertinent portions reprinted in Appendix C).

The trial Court found (Finding No. 2, R. 8) that the partnership agreement providing that the partnership was engaged in the business of financing motion pictures, was in full force and effect at all times. After executing this partnership agreement, all of the activities of Maurice P. Koch in connection with the motion picture field were conducted pursuant to the authority contained in the agreement (R. 139, 140). His time, effort and expenses in motion picture matters were all paid for by the partnership (R. 112, Ex. 2, Appendix B). H. Koch & Sons were primarily interested in the "pre-production" phases of motion picture financing;¹ that is, in supplying the funds

¹Pre-production financing presents the greatest risk and therefore also offers the highest rate of return. The partners all agreed to this type of pre-production financing (R. 42). Pre-production money is also sometimes referred to as "front money" (R. 226, 227) for the purpose of forming the company, acquiring rights to literary properties and artistic talents and facilities. All transactions were in the so-called independent field of the motion picture industry, and for the most part were in the "pre-production" phase (R. 40, 42, 196, 226, 227, 229, 230).

necessary to prepare and develop motion picture projects ("packaging"), as distinguished from actual film production.

It is expected that "front money" will be repaid when the picture is produced and the partnership intended to revolve its funds from picture to picture (R. 40, 42, 196, 226, 227, 229, 230). Partnership cash was limited (R. 180, 273); nevertheless, the partnership was using substantially all of its funds in this manner. The unfortunate and admitted loss created delays and difficulties in concluding financing arrangements on subsequent films in 1947, because these frozen and ultimately lost funds could not be revolved into additional planned projects.

The complaint alleges (S.R. 385, paragraph VI; S.R. 405, paragraph II) and the answer admits (S.R. 417, paragraph 6; S. R. 426, paragraph 2) that of the total funds utilized by the partnership in activating Beacon Pictures and its film "Copacabana", \$90,000 became a complete loss in the year 1947.

Appellants contend that their agreement to engage in the business of financing motion picture ventures, plus the fact that they acted thereunder, was adequate, as a matter of law, to establish that the loss which occurred was "attributable to the operation of their trade or business". The trial Court did not concur in this contention. Appellants thereupon offered extensive evidence of the activities of the partnership in motion picture financing, and demonstrated a constant, continuous course of such business, and exten-

sive and valuable time, efforts and funds expended (limited by the trial Court's rulings).²

The evidence established that in the year 1947, extensive, valuable and consistent time, funds and efforts were expended on the Beacon Pictures' "Copacabana" (R. 63, 67, 68, 75, 76, 77, 80, 132, 134, 159, 191, 192, 201, 202, 208, 209, 210, 213, 214, 215, 216, 218, 220, 221, 231, 247). That constant and repeated activities, time, efforts and funds were expended during the exact period in question with regard to many film projects is demonstrated by the record:

Ambassador Films (R. 81, 82, 83, 85, 86); The Alfred Green Negotiations (R. 77, 78, 83, 84, 87); The Jack Chertok Venture (R. 89, 90, 91, 195, 196, 238, 239, 240); The Producers Finance Venture (R. 95, 97, 165, 166, 183, 184, 192, 193, 194, 198); The Hill of the Hawk Venture (R. 91, 93, 94, 95, 108, 110, 113, 114, 122, 123, 124, 161, 176, 240, 241, 242, 243); Long November (R. 62); The Fred Fisher Story (R. 82, 104, 106, 234, 235); The Monogram Series (R. 98, 99, 100, 107, 111, 112, 236, 237); Thirty Government Training Films (R. 91, 92, 125, 126, 127, 128, 129, 130, 197, 198, 199, 244); Apex Films Corporation (R. 173, 174).

When we consider that each production is a major effort, requiring time to formulate, and when we consider the same in proportion to the resources of H. Koch & Sons, this was indeed an overwhelming show-

²The rulings of the trial Court are noted in the exceptions to the rulings on the evidence, *supra*, and in the discussion of same, *infra*. Considerable and most cogent testimony and documentary evidence was excluded by the trial Court's rulings.

ing. We seriously doubt that any independent individuals, in the field of financing motion picture ventures throughout the world, did as much during the period in question. Appellants urge that these facts be considered in the light of the *written agreement of the partners to engage in the business of financing motion picture ventures*.

Although delayed and hampered by the unfortunate loss in 1947, the partnership continued to raise money by each and every means and use its resources for financing motion pictures. The record (citations above) discloses that as the year 1947 came to a close, the partnership was most active: The Monogram Series was pending; Ambassador Productions purchased "Hill of the Hawk" and was preparing it for filming, the Apex Films' arrangements for the production of more than thirty Government training films was underway; Producers Finance was owned and controlled by the partnership and was advancing funds; Ambassador Productions was wholly owned and controlled by the partnership; large bank borrowings were arranged; and activities were constant.

The income of the individual partners of H. Koch & Sons in the year 1947, and before deducting the \$90,000 loss incurred in the Beacon transaction, was in the sum of \$4,805 each, and the company had no funds (R. 180, 273). Under these circumstances, we particularly note the fund raising efforts and the very substantial funds which were expended and contributed in the course of motion picture financing ventures as disclosed by the entire record (R. 13, 53, 55,

58, 59, 66, 68, 69, 70, 73, 74, 91, 92, 116, 154, 163, 263, 264, 271, 116, 117, 118, 119, 122, 123, 124). The lack of funds and earnings from other sources, when compared with the amounts involved in motion picture activities, dramatically emphasizes the fact that motion picture activity was all important, and "related to the business" of the partnership and not an "isolated or casual" investment. Valuable time was expended not only by the partnership but also by their attorneys in San Francisco as well as in Los Angeles, and by representatives appointed by them (R. 43, 50, 78, 109, 127, 152, 189, 193, 200, 245, 257).

B. THE PARTNERSHIP AGREEMENT.

The written partnership articles provided that the partnership would engage in the business of financing motion pictures (Ex. 2, Appendix B). The trial Court found that the agreement was in full force and effect at all times (Finding No. 2, R. 8). We note, particularly, that the partnership did not attempt at any time to receive "capital gain" treatment with regard to its operations relating to films. However, and for example only, if the partnership had profited in the year 1947 from the sale of an interest in a film, obviously it could not obtain "capital gain" treatment with regard to such sale. It would be foreclosed from "capital gain" treatment by the very terms of its partnership agreement providing that it was in this business. Certainly the taxing authorities would not permit "capital gain" treatment from a sale of an

interest in a motion picture venture to one who has an agreement with another *to engage in the business of financing motion picture ventures*. Having decided to be in such a business, its profits are classified as ordinary income as a matter of law. Therefore, it cannot be maintained that its losses are not likewise related to the operation of its business.

The agreement provides (Ex. 2, Appendix B): (1) That the partnership engage in the business of financing motion picture productions; (2) All assets (funds and credit) of the partnership were made available for this business; (3) Any money advanced by an individual partner over and above sums advanced by the partnership are first refunded to the partner making the advance, and such partner receives a proportionately large share of the profits and losses.³

4. Maurice P. Koch is to manage this part of the business in his own name or otherwise and all of his expenses incurred are paid by the partnership.

The loss was admitted. The complaint pleaded in its various counts loss of the total sum of \$90,000. The answer admitted the loss thereof in the year 1947.

³This does not mean that by making an additional contribution or borrowing for the partnership the particular partner is acting outside the scope of the partnership activity. In this respect the trial Court was considerably confused and in error in its interpretation of the agreement and the pleadings. The complaint alleges that the sum of \$15,000 was advanced by Maurice P. Koch *in the same manner* as the funds which were advanced generally by the partnership (S.R. 405, Paragraph II). All of the funds lost were disbursed from partnership funds, by checks drawn upon the partnership, including the sum for which Maurice P. Koch is entitled to additional loss credit.

The Court found, contrary to the issues framed by the pleadings, that only \$75,000 was lost (Finding 6, R. 8-9).

C. INSTRUCTIONS.

1. The trial Court erred in giving instructions contrary to the law combined with prejudicial misconduct of counsel.

(a) In view of the failure on the part of the trial Court to give proper application to the partnership agreement which provided that the partners were in the business of financing motion picture ventures, evidence was introduced showing that the activities of the partnership were sufficient, even in the absence of such agreement, to remove the situation from an "isolated" transaction, into a loss "attributable to the operation of a trade or business". The activities, the number thereof, continuity, time, effort and intent, all became probative factors in the case.

The trial Court erroneously charged as follows:

"If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf, that transaction cannot be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures." (R. 302.)

The record was as follows:

(i) The evidence was clear and without contradiction that each and all of Maurice P. Koch's acts were for and on behalf of the partnership (see *supra*; also R. 43, 44, 45, 72, 76, 96, 97, 101).

(ii) The written terms of the agreement of the partners established as a matter of law that Maurice P. Koch could only act for the partnership. Not only did the amended partnership agreement (Ex. 2, Appendix B) so provide, but the original partnership agreement (Ex. 1, Appendix A) required that he devote his exclusive and full time and effort to partnership activities.

(iii) Maurice P. Koch borrowed \$15,000 and contributed same to partnership funds in order to make that amount available to the partnership to cover some of the motion picture expenditures previously made (R. 287). Therefore, Maurice P. Koch and his wife sought recovery for this additional \$15,000 loss suffered by them pursuant to the partnership agreement (Appendix B). However, the court misinterpreted the agreement, and erroneously held that in order to receive credit for the additional \$15,000 loss, Maurice P. Koch had to be individually engaged (as distinguished from the partnership) in the business of financing film ventures. Admittedly, he was not individually engaged in any business and that all of his activities were for the partnership. Therefore, the Court granted a directed verdict (or dismissal) as to Maurice P. Koch's claim for allowance of the additional \$15,000 loss suffered by him (and his wife), without hearing from appellants on this matter. (R. 292).

The pleadings admitted that the \$15,000 especially attributable to Maurice P. Koch as well as all other sums making up the \$90,000, were expended and lost.

The defense attempted to amend their pleadings (R. 290) and this motion was denied (R. 292) with the result that at the time the cause was submitted to the jury the loss of the entire \$90,000 was admitted by the pleadings. Although the Court was in error, this ruling of the Court, coming after plaintiffs rested, clearly established that the Court held as a matter of law that there was no evidence in the record that Maurice P. Koch ever acted in his own behalf. Note, also, the discussions with the Court which occurred at the time the exceptions to the challenged instruction occurred (R. 311, 312), at which time counsel for appellants stated:

“We also except with respect to the instruction given by the court that the jury may disregard all the activities of Maurice Koch if such activities involve only him, his own funds, it having been particularly held by this court that as a matter of law all of Maurice Koch’s activities in the motion picture business, the business of financing motion picture ventures, were for and on behalf of the partnership rather than his own behalf and a motion having been granted by reason thereof.

The Court. Very well.”

This error in charging the jury was magnified by the defense argument that Maurice P. Koch’s activities were in his own behalf, and not in behalf of the partnership, and that the jury should *not* consider his activities in determining whether or not the partnership had activity attributable to the particular trade or business. The Government thus took ad-

vantage of the benefits of the motion for a directed verdict which was erroneously granted by the Court on the basis that he was not, at any time, acting in his own behalf, and under these circumstances it was, indeed, unconscionable for the Government to then argue that Maurice P. Koch's activities were in his own behalf and that the jury must, therefore, disregard the same (R. 349, 352, 353, 354).

The error in the instruction is likewise emphasized by the fact that the partnership agreement (Appendix B) provides that Maurice P. Koch is in charge of all film business and that this phase of the business could be carried on in his own name. When the jury took the exhibits to the jury room, they found that all of the documents were in the name of Maurice P. Koch, and no doubt, under the Court's instruction, disregarded his constant activities as well as all of the documentation.

It is erroneous to instruct a jury when there is no evidence to support the theory of fact which the instruction assumes. See *Case of Tweed*, 83 U.S. 504, 16 Wall. 504, 21 L.Ed. 389 (1873); *McCarthy v. Pennsylvania R. Co.*, 156 F.2d 877 (7th Cir.), (1946).

(b) The Court instructed the jury (R. 301-302):

"... there is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion picture ventures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by

a preponderance of the evidence that they were engaged in the trade or business of financing motion pictures. By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force . . .”, etc.

The instruction is clearly in error under the law. In the *absence of evidence* to the contrary, there is a presumption of correctness in favor of the Commissioner, but once evidence is introduced, the presumption fades and vanishes and the case is as wide open upon the evidence as though there had been no determination by the Commissioner, and the case must be decided “upon the evidence, and from it alone”.⁴

In *J. M. Perry v. Commissioner*, 120 F.2d 123 (1941), C.C.A.9, this honorable Court stated, at page 124 with regard to such “presumption” as follows:

“This finding is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issues depend *wholly* upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determi-

⁴*Redfield v. Eaton* (D.C.) (1931), 53 F.2d 693, at p. 696:

“No one doubts that his decision is sufficient basis for the additional assessment and levy, thus casting on a plaintiff who brings the controversy into court the burden of proof upon all material allegations of the complaint. But that the Commissioner’s decision, resting on evidence not presented to the court—in this case the defendant offered not a single witness—has the quality of probative evidence in determining the preponderance of evidence, is a proposition supported neither by authority nor reason.”

nation as evidence of its correctness either directly or as affecting the burden of proof.” (Emphasis ours.)

Citing:

Welch v. Helvering, 290 U.S. 111, 115, 54 Sup. Ct. 8, 78 Law Ed. 212;

Helvering v. National Grocery Co., 304 U.S. 282, 294, 295, 58 Sup. Ct. 932, 82 Law. Ed. 1346;

Helvering v. Talbot Estates, 4th Circuit (1940), 116 F.2d 160, 162.

This honorable Court clearly enunciated the rule in the case of *San Joaquin Brick Co. v. Commissioner of Internal Revenue*, 130 F.2d 220, C.C.A. 9 (1942), at page 225:

“It has often been pointed out that in claiming tax deductions the taxpayer must show clearly that he comes within the statute allowing such deductions. But once he presents competent and relevant evidence on every necessary element, the presumption of correctness of the Commissioner’s determination *is no longer existent* and the outcome of the case depends upon the determination of the trial body after the consideration of the evidence brought before it by both sides.” (Emphasis ours.)

And this honorable Court subsequently stated in *Hemphill Schools v. Commissioner of Internal Revenue*, 137 F.2d 961, C.C.A. 9 (1943) at pages 963, 964, as follows:

“Whether that determination was correct or incorrect was the principal, if not the sole, issue in the case. The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct. *Evidence was produced.* Some of the evidence produced by the petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, *the presumption ceased, and thenceforth the issue depended ‘wholly upon the evidence’.* It thus became the duty of the Board to find *from the evidence, and from it alone*, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the *presumption (which no longer existed)* as if it were evidence, weighed it against petitioner’s evidence and concluded that petitioner’s evidence did not ‘overcome’ it.

Decision vacated and case remanded, with direction to (1) find from the evidence, *and from it alone*, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business.” (Emphasis ours, as well as this Court’s in certain instances.)

In *Lawrence v. Commissioner of Internal Revenue* (1944) (9th C.C.A.), 143 F.(2d) 456, this Court held that the presumption disappears when evidence is introduced sufficient to establish a prima facie case. We are constrained to observe that the policy of the

law cannot permit the extension of any rule whereby the person sued becomes the judge in the same lawsuit.

This unfortunate and devastating error in instructions occurred after the law upon the subject was argued to the Court and followed upon the heels of argument by the Government to the jury as follows (R. 344-345):

“In this case, and the Court will so instruct you, I believe, there is a presumption that the Commissioner of Internal Revenue’s determination is correct. You see, the plaintiff already had one crack at this case. He filed his claim for refund with the Commissioner of Internal Revenue and the Commissioner denied it.

Mr. Fink. Your Honor, I am going to enter an objection. We have not tried this case before. This is a lawsuit in itself.

The Court. This is the first time the case has been tried, counsel is correct, a claim has been filed.

Mr. Gillard. I will amend the word case and say ‘matter’. In connection with this claim for this deduction the matter has been previously presented by the plaintiff to the Commissioner of Internal Revenue and contrary to what Mr. Fink told you what the Commissioner of Internal Revenue said was ‘No, you do not have a business bad debt, you have a non-business bad debt’, and the Court will instruct you, I believe, that what a non-business bad debt means is that the parties were entitled . . . and in denying the claims made by plaintiffs, the Commissioner of Internal Revenue allowed each one of these plaintiffs on their tax returns for 1947 a deduction . . .”

And at the very closing final appeal, the Government stated to the jury:

“We submit to you, Ladies and Gentlemen, the finding of the Commissioner of Internal Revenue, who was a duly and regularly appointed executive officer of the Government, sworn to administer internal revenue laws, that his finding that this was a non-business bad debt, and under the Internal Revenue Code provisions that each of the seven parties to this action were entitled to take a deduction of \$1,000 per year against ordinary income for six years, was the correct conclusion in this case . . .” (R. 370-371).

By this argument, fortified by the erroneous instruction of the Court which followed, the jury were in effect told that their sworn officers at law had made a determination and knew more about the income tax system than the jury could ever know and that the determination was correct and remained correct and was sufficient to overcome all evidence offered against it.

The situation here is a far cry from the rule of this honorable Court that “the commissioner’s determination is no longer existent” . . . “the issue depended wholly upon the evidence” . . . “Find from the evidence, and from it alone . . .” etc. This erroneous instruction, combined with prejudicial misconduct of counsel, requires reversal.

(Note: The Court made its own findings and conclusions based upon the erroneous concept that the presumption continued, persisted, and pervaded all.)

2. The trial Court erred in its failure to give properly requested instructions necessary to a determination of the cause and in failing to give properly requested instructions upon plaintiffs' theory of the case.

In the absence of an agreement and other tangible evidence, the Courts have resorted to an analysis of the activities of the person involved to ascertain whether or not the transaction was related to a business.⁵

Not only did the four parties agree to engage in the business, but they actually so engaged in the busi-

⁵In the absence of agreement, apparently the determination of whether one is engaged in a business turns upon the extent of his activities in the field in question.

Dalton v. Bowers, 287 U.S. 404, 53 S. Ct. 205, 77 L. Ed. 389;

Burnet v. Clark, 287 U.S. 410, 53 S. Ct. 207, 77 L. Ed. 397;

Maloney v. Spencer, 9th Cir., 172 F.2d 638;

Daily Journal Co. v. Commissioner, 9th Cir., 135 F.2d 687;

Miller v. Commissioner, 9th Cir., 102 F.2d 476;

Commissioner of Internal Revenue v. Boeing, 9th Cir., 106

F.2d 305, certiorari denied 308 U.S. 619, 60 S. Ct. 295, 84 L. Ed. 517;

Harvey v. Commissioner, 9th Cir., 171 F.2d 952;

Fackler v. Commissioner, 6th Cir., 133 F.2d 509;

Kales v. Commissioner, 6th Cir., 101 F.2d 35;

Foss v. Commissioner, 1st Cir., 75 F.2d 326;

Commissioner of Internal Revenue v. Stokes' Estate, 3rd Cir., 200 F.2d 200;

Campbell v. Commissioner of Internal Revenue, 11 T.C. 510;

Henry R. Sage v. Commissioner of Internal Revenue, 15 T.C. 299.

Our search does not reveal any instance of similar tax contention where two or more people have agreed to engage in a certain business and have acted accordingly. The authorities hold that when a loss is suffered by reason of membership in a partnership, such loss is attributable to the trade or business of the partnership. It has been so held in instances upon termination of a partnership business when one partner remains indebted to the other and the indebtedness becomes uncollectible. In these cases the creditor was not engaged in the business of selling business interests or of terminating businesses. Nevertheless, the Tax Courts have held that losses resulting from an indebtedness by one partner to an-

ness pursuant to the agreement, and with a degree of regularity and continuity far and beyond that which is ordinarily to be found in the particular business in which they engaged.⁶

In view of the trial Court's rulings that appellants' written agreement, under which they at all times acted, did not, as a matter of law, establish that the particular loss was attributable to their trade or business, appellants presented evidence, and most of the record is devoted to a showing of a course of conduct by delineating activities.

We note that we are dealing with intangible "front money" activities in an intangible business where many ideas are started and few become finalized, where most efforts result in failure, and normally result in endless delays.

The defense argued that the jury should disregard all of the activities of the partnership devoted to the

other are business bad debts, and therefore deductible in full (see *Davis v. Commissioner of Internal Revenue*, 11 T.C. 538. *Depuy v. Collector of Internal Revenue*, 55,081 Prentice Hall T.C. Memo., Docket No. 50,352 (1955).)

Corporations may deduct all of their losses including bad debts of every kind. Apparently, the theory underlying this rule is that clearly corporations are engaged in business. The same rule of reason should apply to a partnership. It would appear unnecessary to require a search for details, which under the clear concept of the law of evidence can only be admitted for the purpose of showing intention by proof of overt acts when in fact the parties have stipulated their intentions in formal writing and have acted accordingly.

⁶E.g., if four attorneys agree to practice law, they are clearly engaged in the law practice whether they ever conclude a case or not. Thus, also, if four persons agree, in writing, to erect suspension bridges and actually make numerous attempts to promote and sell the same, they are in that particular business, whether the bridges are ever built or not.

purpose of financing motion picture ventures unless such activities actually resulted in concluded substantial financing during the exact period in question (R. 369).

Appellants' proffered evidence, theory of the case, and argument were based upon the proposition that the activities, time, effort and money expended must be considered so long as the same related to the business of financing motion picture ventures and whether or not actual ventures were concluded and financed within the exact year in question. The ultimate question of fact is whether or not the loss occurred in the course of activities attributable to a particular trade or business.

Under these circumstances, appellants presented proper instructions upon the subject (R. 23, 24, 25, 26) and upon appellants' theory of the case. These instructions were proposed in order to give the jury some basis for its consideration of the substantial portions of the trial devoted to the activities of the partnership. The instructions were absolutely necessary as a basis for consideration of matters as follows:

1. The amount of time necessary to be devoted;⁷
2. Amount of capital necessary to be devoted;
3. Whether or not more than one business may be conducted by a partnership;

⁷One may be engaged in a particular business although he devotes the major portion of his time and capital to another business (*Snyder v. Commissioner* (1935), 295 U.S. 134, 55 S. Ct. 737, 79 L. Ed. 1351; *Maloney v. Spencer* (C.C.A. 9) (1949), 172 F.2d 638).

4. Carrying on a business by devoting the time and attention of employees, agents, lawyers and representatives as distinguished from personal time;

5. That it was not necessary that transactions be *concluded* within the exact period in order that the devotion of time, effort and expenditures with respect thereto be considered; and

6. That it was not necessary that the transactions be concluded within the exact limits of the year 1947, in order for the jury to consider the time, effort and expenditures with relation thereto during the year 1947.

The failure to give the requested instructions (R. 23-26), or any of them, left the jury virtually uninstructed.

Each party is entitled to have his theory of the case submitted to the jury if there is any evidence to sustain it, and the theory of each party should be stated with equal completeness and clearness.

88 *C.J.S.* Trial Sec. 301b, pp. 816, 817;

53 *Am. Jur.* 487, 488, Trial Sec. 626;

Aetna Life Insurance Co. v. Moore, 231 U.S.

543, 34 Sup. Court 186, 58 L. Ed. 356 (1913).

In *Chicago & N. W. Ry. Co. v. Green*, 164 F.2d 55 (C.C.A. 8, 1947), the Court stated:

"It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made." (Emphasis ours.)

The Court did not give the jury any instruction upon which to predicate a finding or a "Yes" answer to the interrogatory propounded.

Also the following instructions consistent with the evidence and proper theory of the case was requested (R. 25) and refused.

"That if you should find that H. Koch & Sons, acting through one or more of its partners, or acting through persons, firms, corporations or representatives appointed by said partnership, regularly and continuously participated in the promotion and financing of motion picture ventures during the year 1947, then you must find that H. Koch & Sons was engaged in the business of financing and promoting motion picture ventures and that said business was regularly conducted."

D. THE COURT ERRED IN GRANTING A DIRECTED VERDICT (OR PARTIAL DISMISSAL) AGAINST MAURICE P. KOCH AND DAISY KOCH.

It is not clear whether the Court granted a partial dismissal or directed verdict against Maurice P. Koch and his wife.

The trial Court, for the most part on its own initiative, granted a directed verdict, or dismissal against Maurice P. Koch with regard to a loss admittedly suffered by him in the sum of \$15,000.00 (R 292). All amounts were advanced by H. Koch & Sons, the co-partnership. After having advanced said funds, it appears that the partnership was short of funds

and Maurice P. Koch personally borrowed \$15,000.00 and contributed the same to the partnership (R. 287-8). The Court was in error in not finding that the \$15,000.00 loss was attributable to the partnership business. The error no doubt arose because of the failure of the Court to properly interpret the partnership agreement, as previously noted.

Even in the absence of the partnership agreement, the \$15,000.00 loss was a business loss.

In *Harding v. United States*, 113 Fed. Supp. 461 (1953), the plaintiff was a member of a partnership and personally borrowed funds and made a personal loan of the same to a third party with which to purchase a seat on the stock exchange for the purpose of promoting the interests of the brokerage partnership of which plaintiff was a member. The Court at page 463 of the opinion stated:

“Plaintiff’s sole purpose in borrowing the money was to promote the interests of this partnership. Plaintiff’s business was carried on through the partnership, and the loan therefore was made to promote plaintiff’s business. The loss of a portion of the loan was, therefore, directly attributable to the carrying on of plaintiff’s business.”

E. ERRORS IN RULING ON THE ADMISSIBILITY OF EVIDENCE.

(1) The advancement of the funds lost were made more than ten (10) years prior to trial and the actual loss occurred more than nine (9) years prior to trial.

By agreement (Ex. 2, Appendix B) all activities of the partners in relation to motion picture finances were conducted by Maurice P. Koch. At the time of trial it became essential to determine the amount of time expended by him. The Court did not permit Maurice P. Koch to testify to the number of transactions in which he participated (R. 60). The Court held that it would be necessary to go into the details of each transaction without specifying any particular number or general continuity of time expended. The ruling was erroneous and eliminated the most pertinent and cogent testimony in the case. To make detailed moment by moment proof of activities and the contents of conversations and conferences conducted ten years prior to trial would result in hopeless confusion (e.g., if we were establishing the experience of a trial lawyer under the rule of evidence prescribed by the trial Court, we would be required to go through the exact details of each law suit in which he was ever engaged). Appellants were required, as a practical matter, to adopt some limits with regard to details, because to make proof in a trial Court of the details of activities which required more than one year for their occurrence, would, no doubt, require considerable unnecessary weeks and months to delineate by way of admissible testimony in a court room. Attempts by appellants to comply with this ruling did not fare well. Appellants sought to introduce documentation which resulted from interminable negotiations, conversations, discussions, trips, telephone calls, efforts of counsel and others and the

trial Court excluded the same. The jury were entitled to draw the reasonable inference from the very nature of the documentation, the many terms and provisions involved, the meticulous care in which the same were documented, the fact that in most instances several large feature films were projected and provided for, that the same required expenditure of very considerable time upon the part of persons acting for the partnership.

The documents were not offered to prove the truth of their contents, but were offered for the purpose of showing the time and effort expended and, further, to show the intention of the partnership as indicated by the overt acts of negotiations which resulted in the documentation. In particular instances, as will hereinafter be noted, documentation was excluded which had been fully executed and which was absolutely essential to explain the background and underlying reason for activities testified to and without which documentation the activities in and of themselves did not make sense.

Some of the instances of the exclusion of such documentation are as follows:

1. Exhibit 5, for identification (Appendix D) was repeatedly offered (R. 46, 210-212, 213-214). This was an Agreement between one, Coslow and United Artists Corporation for the production and distribution of "Copacabana" throughout the world. The due execution of the document was proved and it was likewise established that the picture "Copacabana" was pro-

duced and distributed pursuant to this agreement (R. 210-212). Since this was a fully and duly executed agreement pursuant to which the partners acted and the partners lost \$90,000.00, it was competent and relevant to show the following:

That Coslow contributed distribution facilities; that he had to be the principal stockholder of the corporation producing the same; and that he had to be the producer thereof. Therefore it became necessary for the partnership to provide the funds to activate Beacon Pictures Corporation, permitting Coslow to be the stockholder. The reason why the partnership became the beneficial owner of a substantial part of the picture "Copa-cabana" instead of co-producers and co-owners thereof is only explained by reference to this agreement. The agreement tends to establish the reason for activating the corporation for the production of films, and perhaps why corporations were organized. The agreement was necessary to supply the missing link in the testimony, and which was not otherwise admissible, to establish why appellants activated Beacon Pictures Corp., and to establish why appellants could not become the co-producers of the films.

A principal portion of the trial was devoted to inquiries as to why the partnership expended funds in activating Beacon Pictures Corporation with no other competent evidence to explain the reason for this expenditure except the terms of the said Agreement. The Court gave as reason for

its failure to admit the document in evidence that the names of H. Koch & Sons did not appear in the instrument (Exhibit 5 for identification) and the Court refused to hear from counsel thereon (R. 214). Appellants were third party beneficiaries to the Agreement, and in accordance with its terms, appellants (who were not named therein) would have received their income and benefits directly from United Artists (App. D).

Plaintiffs' theory of necessary proofs was as follows:

(i) The formal agreement of the parties entered into years prior to the loss in question and pursuant to which the partnership agreed to engage in the business of financing motion picture ventures as a business activity, and (ii) The numerous activities in regard to motion picture financing at the time in question; (iii) The substantial time expended by the personal activity of partners and the attorneys, agents and employees of the partnership.

When plaintiff sought to inquire as to the amount of time expended by directly inquiring into the fact in question, the Court erroneously sustained objection (R. 60):

“Q. (By Mr. Fink). Can you tell us approximately how many different deals were looked into by you over the period of the last six months of 1946?

Mr. Gillard. I object to that as vague and speculative, and calling for the opinion and conclusion of the witness.

The Court. I think in view of the objection he would have to give the individual contacts."

When plaintiffs made direct inquiry of a disinterested witness, who was present at almost every transaction, as to the amount of time spent by Mr. Koch in these activities to "your own personal knowledge" in the year 1947, this testimony was likewise excluded.

See (R. 245-246) "Q. (By Mr. Fink). So far as your own personal knowledge is concerned, with regard to the year 1947, approximately what part of Mr. Koch's time did he spend in connection with motion picture activities?

Mr. Gillard. I object to that as calling for the opinion and conclusion of the witness.

The Court. Sustained."

The manner of the trial judge suggested very strongly that extreme censorship would follow repeated attempts along this line. It was error to eliminate testimony upon time spent and number of transactions entered into during the periods in question. However, it was virtually impossible to overcome these errors when, in keeping with the Court's rulings, appellants sought to introduce the details relating to each separate transaction. Appellants offered documents prepared at the time and during the course of numerous transactions entered into in the period in question. Thus, appellants offered Exhibit 19 for

identification (Appendix E). This is an unsigned document which was negotiated by appellants during the year 1947 for the financing and production of a series of films. The record established that the parties to the agreement are well-known creative persons in the film industry. The offer of this document was specifically made for the purpose *only of showing the activities* of the partnership in financing motion pictures during the year 1947 and as part of the consistent and extended time and efforts expended, all to the point that the transaction in which the loss occurred was not an isolated instance of activity (R. 79-81). The document was prepared at the direction of the partnership; by counsel employed by the partnership; was reviewed by the partnership; was acceptable to the partnership; was part of the effort put forth in connection with the business of participating in the promotion and financing of motion pictures in the year 1947; was prepared in the course of that business; and all the shares of stock of the corporation involved (Ambassador Pictures) were acquired by the partnership (R. 78-85).

The offer of Exhibit 19 for identification was renewed (R. 84-85). The Court still refused to admit this and similar documents on the grounds that the same were not executed. The record was quite clear that documentation of this type was not offered to establish that a "package" was concluded, but was offered purely for the purpose of showing the time and effort expended. If this document and other sim-

ilar documents offered had been admitted by the Court, the jury could have reasonably drawn the inference, from the very nature of the transactions disclosed, that the preparation thereof was attended by negotiations, time, effort, attorneys' charges and other expenses. Certainly in determining whether or not a company is engaged in the business of financing, one should not be limited to consideration of activities only when funds are actually advanced.

The same situation applied with regard to Exhibit 21 for identification (Appendix F). The proposed employment contract between Ambassador Productions (the wholly owned corporation) and a director named Al Green (R. 84-85) which the Court excluded on the same ground, to wit, that it was not executed.

The same error occurred in connection with the offer of Exhibit 26 for identification (Appendix G), a contract negotiated in the exact period in question between Monogram Pictures Corporation and Ambassador Productions, Inc. (appellants' wholly owned corporation) for the financing, production and distribution of a series of films, together with a letter dated September 25, 1947, from Monogram Pictures Corporation. Although it was stipulated that the documents were prepared and received, the Court refused to admit the documents on the grounds that the same were not executed, and upon this premise the Court held that there was no foundation laid for their introduction (R. 99-100).

This document would have established that not only was someone doing something for the partnership in this field of endeavor, but reasonable minds could have drawn the inference that a great and extended effort was involved in arriving at the point of this documentation and that there were expenses and negotiations in connection therewith. It was clear that the document was offered for the purpose of proving activity and not to prove that a transaction was concluded. We submit that many transactions, which were intended to be concluded, could not be concluded due to the loss of the \$90,000.00 of funds in question. This loss was not realized at the time of these negotiations.

The Court likewise refused admission of Exhibit 29 for Identification (Appendix H), a letter of November 19, 1947, which established that negotiations and activities were continuing between the partnership and Monogram on that date (the prior documentation and correspondence, Exhibit 26 for Identification, having been dated September 25, 1947). Although it was stipulated that the letter was received, the Court nevertheless refused to admit the same. The grounds for its ruling are not clear unless it was because one of the attorneys to whom the letter was addressed was a director of the corporation which was wholly owned by the partnership; however, the record clearly established that the attorneys were acting for the partnership at all times and organized the corporation and

negotiated and prepared documentation only for and on behalf of the partnership (R. 78, 88-89, 109, 124). The Court's ruling, basically, was consistent with its opinion that such documentation should be excluded (R. 107-108).

The Court having ruled that only concluded transactions for financing need be considered, appellants attempted to offer evidence of actual advancement of funds and, among other things, established that a project was negotiated in 1947 for the financing of a series of army training films to be made by Apex Film Corporation. The first advancement of funds, however, occurred on January 26, 1948 (immediately following the close of the year in question). Appellants offered the cancelled check and details of the advances from the partnership, whereupon the Court ruled that details would not be admitted (R. 128-130). Objection was apparently made on the ground that the funds were expended after the close of the year 1947. The Court had ruled that only details of transactions were admissible for the year 1947 (R. 60, 245-246), and for the following month only general information. This evidence would tend to prove that the parties were engaged in the business at the end of the year 1947.

The Court likewise refused to admit Exhibit 24 for Identification which was offered to show extended negotiation over many months for the purchase of the story property "Hill of the Hawk" for the wholly owned partnership corporation, Ambassador Productions (R. 92-93). Funds were advanced and expended

in this project during the year 1947 and remained outstanding at the close of that year. The erroneous exclusion prevented proof of the commencement of negotiations and the time expended and intervening between initiation and closing of the "package".

Because "Hill of the Hawk" and other assets continued to be held by appellants for some years after expiration of the year 1947, and because defendants proved that "Hill of the Hawk" and Ambassador Productions was sold out some years later, appellants sought to offer testimony with regard to when the partnership discontinued its motion picture financing activities. This evidence was excluded on the erroneous ground that the questions called for a conclusion (R. 181, 182).

F. ERRONEOUS FINDINGS.

(1) Finding No. 2 (R. 8) finds "Said Articles of Co-Partnership were amended by written agreement dated October 23, 1944" pursuant to which the partners agreed to also engage in the business of financing motion picture productions. "The said partnership agreement, as amended, has remained in full force and effect at all times herein mentioned." The Court followed this finding with its erroneous and confusing finding No. 5 which determines that "For the years 1945, 1946 and 1947 . . . — were partners in the business of manufacturing and selling luggage . . . " Thus, finding No. 2 and finding No. 5 are clearly in conflict.

Finding No. 5 is contrary to the basic and formal partnership agreement and the acts of the partners. The findings fail to find that the partnership had any activity in the business of financing motion pictures. If the Court had found that the number of activities was insufficient to constitute the doing of business, we would certainly differ; however, here in the face of overwhelming evidence the Court, in effect and tacitly, finds none. The record does not even leave open the possibility for consideration of the judgment in the light of appropriate findings.

(2) The complaint alleges and the answer admits the loss of the total sum of \$90,000.00 (*supra*). Finding No. 6 (R. 8-9) finds that only \$75,000.00 was lost which is contrary to the pleadings and issues as framed and upon which the cause was tried. The finding designates that a loan transaction occurred, whereas, in essence, the transaction was one by which the partnership acquired the largest block of ownership in the film of all participants by reason of its advancement of the \$90,000.00 which was lost and by reason of its activation of the corporation in whose name the picture was made.

(3) Findings Nos. 8 and 9 (R. 9-10) recite that the Collector of Internal Revenue "advised each of the plaintiffs that the claims for the year 1945 were denied, and that the claims for the year 1947 would not be allowed on the theory advanced to support the claims, but would be allowed as a non-business bad debt and not otherwise". This finding assumes that

plaintiffs are bound by the findings of the Collector of Internal Revenue and that this alleged presumption of correctness continues at the close of the lengthy trial to outweigh all evidence. At the close of the case, and after voluminous testimony, this "presumption of correctness" erroneously controls the determination of the cause. Since the determination of the Commissioner can no longer be considered as evidence in the cause, Findings 8 and 9 are not supported by the evidence.

(4) Finding No. 10 is in error. The Court here finds "Maurice P. Koch was not engaged in the business of financing motion picture ventures during the calendar year 1947". This fact was not in issue. The record is clear that all of his activities were in behalf of the partnership and never in his own behalf. The partnership agreement so provided (Exhibit 1, Appendix A; Exhibit 2, Appendix B). All of the funds, including the entire \$90,000.00 loss, was disbursed by the partnership upon the partnership bank account. Maurice P. Koch acted only for the partnership and not for himself and there is no evidence to the contrary (R. 43, 56, 57, 72, 76, 96, 97, 101, 112, 122-125, 191). The partnership agreement provided (Exhibit 2, Appendix B) that if one of the partners contributed more funds to the partnership than the others, such partner obtains a larger share of the profits and losses. Maurice P. Koch contributed an extra \$15,000.00 to the partnership funds and therefore was entitled to a larger share of the profits and losses. The

Court, however, interpreted the agreement erroneously and determined that Maurice P. Koch could not have the advantage of the additional loss unless he was personally (as distinguished from the partnership) engaged in the business of financing pictures, aside from his participation as a partner. There was absolutely no evidence in the record to show that he had ever engaged in his own behalf; and based upon its erroneous interpretation, the Court granted a nonsuit to the extent of his claim for the additional loss sustained.

(5) Finding No. 11 (R. 10) is in error in that the finding is predicated upon the assumption that the loss had to be related to a particular form of activity with third persons, (i.e. debt, joint venture, etc.). The only question at issue was whether or not the loss was related to a trade or business carried on by the plaintiffs. This must be determined by the plaintiffs' "trade or business", and is not at all determined by the particular form of the dealings with others. The plaintiffs already had a partnership pursuant to written agreement providing that they would engage in the business of financing motion picture ventures, and the pleadings admitted the loss of \$90,000.00 incurred in financing a motion picture.

(6) Finding No. 12 (R. 10) recites:

"12. The parties stipulated that the plaintiffs' rights to recover the alleged overpayments of taxes would require the jury to answer 'yes' to the following interrogatory submitted to them:

‘During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?’”

Finding 12 assumes that stipulations were entered into which were not entered into, and this finding is contrary to the express record. The record on the subject (R. 293) discloses the following:

“The Court. May it be stipulated by both parties that in view of the Court’s rulings up to this time, that the only issue to be presented to the jury is the special interrogatory which reads as follows:

‘During the year 1947 was H. Koch & Sons regularly engaged in the business of financing motion picture ventures? Yes—no.’

May that be stipulated?

Mr. Fink. So stipulated.

Mr. Gillard. So stipulated.

The Court. May it be further stipulated that thereafter, after such special interrogatory has been submitted to the jury, that all motions, issues and facts involved in the case are to be determined by the Court unless the parties stipulate as to such motions, issues or facts?

Mr. Fink. So stipulated.

Mr. Gillard. So stipulated.”

It was clear that only this one interrogatory could be agreed upon. All other matters were left for determination by the Court. The Court cannot avoid the necessity of finding fully and correctly upon the material issues involved. Thus, peculiarly, we have

no finding whatsoever that the partnership had any motion picture financing activities or business or the extent of the relationship to the business.

G. ERRONEOUS CONCLUSIONS OF LAW.

The conclusions of law are erroneous in that they are based upon findings which are not supported by the evidence. They are apparently based upon stipulations which are not existent and contrary to the record. The conclusions in the first instance are based upon the presumption of correctness of the Commissioner of Internal Revenue's determination which is non-existent (see *supra*) after evidence was introduced. The conclusions are in error because the pleadings admit the loss of \$90,000. The conclusions of law are erroneous because they assume (Conclusion No. 4, R. 11, as well as other conclusions) that Maurice P. Koch individually (as distinguished from the partnership) made a loan. The entire \$90,000 was advanced by the partnership from partnership funds. All activities were conducted under the partnership agreement, by the partnership, and the loss was incurred by the partnership, as clearly demonstrated by the entire record, and not by Maurice P. Koch individually. This erroneous interpretation of the agreement by the Court, erroneous findings, erroneous partial dismissal, and now erroneous conclusions of law, have nullified the entire proceeding and prejudiced the determination of this cause.

H. THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE.

(1) The judgment is based upon the determination by the jury of an answer to a special interrogatory. This answer to the interrogatory could only be based upon the erroneous instruction of the Court (R. 301, 302) that "There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion picture ventures is correct" and the further instruction that this presumption could only be overcome by a preponderance of the evidence. The findings of the Court are likewise predicated on this presumption (Finding No. 8, page 9) and the entire findings are based thereon. The conclusions of law likewise result from this alleged presumption and therefore are likewise erroneous.

It follows that the judgment is erroneous and in contravention of the express decisions of this Honorable Court (see 9th Circuit decisions, *supra*: *J. M. Perry v. Commissioner*, (120 F.2d 123 (C.C.A. 9)); *San Joaquin Brick Co. v. Commissioner of Internal Revenue*, 130 F.2d 220, at page 225 (C.C.A. 9); *Hemp-hill Schools v. Commissioner of Internal Revenue*, 137 F.2d 961, at pp. 963, 964 (C.C.A. 9).)

In said last case the Court stated: "Whether that determination (referring to determination by the Commissioner of Internal Revenue) was correct or incorrect was the principal, if not the sole, issue in the case." Peculiarly, this language applies with equal force to the instant case. It was practically the sole

issue relating to all facets of the instant cause and in all such facets the trial Court's rulings and determinations were erroneous with the result that the judgment is likewise erroneous.

No witnesses were called by the defense; no evidence was elicited by the defendant; all the evidence conclusively establishes that (a) plaintiffs had entered into a partnership agreement for the purpose of engaging in the business of financing motion picture ventures; (b) that they did so engage continuously during and throughout the entire period in question; (c) there is no evidence to the contrary in the absence of the alleged "presumption"; (d) the jury determined that the Commissioner of Internal Revenue knew more than they did about tax cases and found in accordance with the Commissioner's findings and not in accordance with the facts of the case; and (e) the Court took the answer to the interrogatory as the answer to the case, and assumed stipulations which did not exist for the purpose of resolving the entire matter based upon the erroneous determination by the jury.

The judgment is not sustained by the facts or the law.

I. PREJUDICIAL MISCONDUCT OF COUNSEL.

Counsel for the Government told the jury that plaintiff was now engaged in a second trial of this matter; that plaintiff "already had one crack at this

case," (R. 344), and despite objections by plaintiff's counsel, Government counsel insisted upon telling the jury that the Commissioner of Internal Revenue had made a "determination" against the plaintiff. (R. 344.) These statements were fortified by further remarks of counsel that the Commissioner of Internal Revenue, who was sworn to uphold and preserve the people's rights, had determined the matter once and that the Commissioner knew more about tax determinations than the jury. (R. 371.)

Furthermore, in effect, Government counsel told the jury that plaintiff was attempting by surreptitious means to evade the "determination" of the Commissioner of Internal Revenue by laying down a "smoke-screen" (R. 346) and by attempting to "snow" the jury. (R. 366.)

Thus we have the attorney for the people (and therefore the representative of the jury) deliberately telling the jury to disregard all the evidence relating to transactions conducted by the plaintiff continuously and regularly and at great effort and cost, when said counsel knew that his statements were diametrically opposed to all the law on the subject and that in fact the jury was empaneled only to consider the extent of such activities, and certainly under all known law on the subject the jury should not have disregarded such activities.

J. CONCLUSION.

It is respectfully submitted that the judgment should be reversed and remanded to the trial Court for the computation of the amounts due plaintiffs; or, in the alternative, that judgment be reversed and the cause be remanded for trial.

Dated, February 7, 1958.

Respectfully submitted,

MAX FINK,

LEON SCHILLER,

Attorneys for Appellants.

(Appendices Follow.)

Appendices.



EXHIBITS WHICH ARE PART OF RECORD

Number of Exhibit	Description	Page References to the Record			
		Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
1	H. Koch & Sons Partnership Agreement dated December 31, 1941	R 35	R 35	R 35	
2	Amendment to Agreement of December 31, 1941	R 35	R 35	R 36	
3	Producers Syndicate Agreement	R 36	R 36	R 37	
4	Agreement between Copacabana, Inc. and Beacon Pictures, Inc. dated April 8, 1946	R 41	R 41	R 42	
5	Agreement between Coslow and United Artists Corporation	R 45	R 46 R 211 R 213 R 214		R 46 R 212 R 213 R 214
6	Photostat of check of April 25, 1946, drawn by H. Koch & Sons to order of David Sebastian in amount of \$15,000.00	R 47	R 47	R 47	
7	Letter of May 17, 1946, from David Hersch to H. Koch & Sons acknowledging receipt of funds	R 51	R 51	R 51	
8	Photostat of check drawn by H. Koch & Sons to order of David Sebastian in amount of \$2,500.00	R 53	R 53	R 53	
9	Letter dated July 31, 1946, from H. Koch & Sons to David Hersch	R 54	R 54	R 54	
10	Telegram addressed to Maurice P. Koch from David Hersch	R 54-5	R 55	R 55	
10 A	Photostat of check drawn by H. Koch & Sons to order of David A. Sebastian for \$50,000.00	R 55	R 55	R 55	

Exhibits Which Are Part of Record (Continued)

Number of Exhibit	Description	Page References to the Record			
		Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
11	Letter from Bank of America to David Hersch dated September 25, 1946	R 64-65	R 65	R 65	
12	Promissory note of August 31, 1946, executed by Beacon Pictures Corporation and payable to order of Maurice P. Koch for amount of \$50,000.00	R 68	R 68	R 68	
13	Check drawn by H. Koch & Sons to order of David Sebastian for \$30,000.00	R 68-69	R 69	R 69	
14	Promissory note of October 17, 1946, executed by Beacon Pictures Corporation to order of Maurice P. Koch for amount of \$30,000.00	R 69	R 69	R 69	
15	Letter of August 12, 1946 signed by David Hersch and David Sebastian, addressed to Murray P. Koch	R 69	R 70	R 70	
16	Agreement between Murray P. Koch in behalf of H. Koch & Sons and Beacon Pictures Corporation, dated August 31, 1946	R 72	R 73	R 73	
17	Supplemental Agreement between Murray P. Koch in behalf of H. Koch & Sons and Beacon Pictures Corporation, dated October 17, 1946	R 73	R 73	R 73	
18	Check drawn by H. Koch & Sons to order of Beacon Pictures Corporation, dated November 22, 1946, for \$20,000.00	R 73-74	R 74	R 74	
19	Unsigned document establishing venture for financing and production of a series of films, between Maurice P. Koch, in behalf of H. Koch & Sons, and other persons in the film industry	R 78, 80, 82	R 79, 80, 81, 82 84-85		R 80, 85

Exhibits Which Are Part of Record (Continued)

Exhibit	Description	Page References to the Record			
		Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
0	Permit of Department of Investment, State of California, authorizing Ambassador Productions, Inc. to issue its shares of stock	R 83	R 83	R 83	
1	Unsigned Agreement between Ambassador Productions, Inc. and Alfred E. Green, dated April 28, 1947, providing for employment of Green	R 84, 85	R 84, 85		R 85
2	Document entitled "Mortgage," dated February 7, 1947, executed by Beacon Pictures Corporation in favor of Murray P. Koch	R 86, 87	R 87	R 87	
3	Articles of Incorporation of Ambassador Productions, Inc.	R 88	R 88	R 88	
4	Letter from Annie Laurie Williams to Max Fink, dated October 17, 1946, regarding Hill of the Hawk	R 92, 93	R 92, 93		R 93
5	Articles of Incorporation of Producers Finance Corporation	R 95, 96	R 95, 96	R 96	
6	Unsigned Agreement negotiated in 1947 between Monogram Pictures Corporation and Ambassador Productions, Inc. for financing, production and distribution of films, together with letter of transmittal dated September 25, 1947, from Monogram Pictures Corporation	R 99, 100	R 99, 100		R 99, 100
7	Letter of Harry Fox to Max Fink, dated July 3, 1947 relative to Fred Fisher story	R 104, 105	R 104, 105	R 105	
8	Letter of Harry Fox to Max Fink, dated September 29, 1947, relative to Fred Fisher story	R 105, 106	R 105, 106	R 106	
9	Letter of November 19, 1947, from Monogram Pictures Corporation to Max Fink	R 107, 108	R 107, 108		R 108

Exhibits Which Are Part of Record (Continued)

Number of Exhibit	Description	Page References to the Record			
		Exhibit Identified	Exhibit Offered	Exhibit Received	Exhib Reject
30	Check for \$7,000.00 dated December 3, 1947, payable to Ambassador Pictures Corporation and issued by Maurice P. Koch	R 114	R 114	R 114	
31	Agreement between Scott O'Dell and Ambassador Pictures Corporation dated December 12, 1947	R 115	R 115	R 116	
32	Check for \$5,000.00 dated June 8, 1948, to Max Fink from Maurice Koch and check for \$5,000.00 dated June 9, 1948, drawn on the trust account of Fink, Rolston, Levinthal & Kent, to Annie Laurie Williams, Inc.	R 116, 117, 118	R 117, 118	R 118	
33	Two checks of May 10, 1948, one for \$4,500.00 and one for \$500.00, both drawn on trust account of Fink, Rolston, Levinthal & Kent, to Annie Laurie Williams, Inc. A check for \$8,000.00, dated July 9, 1948, drawn on same account to same payee	R 119, 120	R 119, 120	R 119, 120	
34	Letter of July 8, 1948 from H. Koch & Sons to Max Fink and letter of July 9, 1948, in reply	R 122	R 122	R 122	
35	Amended 1947 Partnership income tax return	R 186	R 186	R 187	
36	Stock Permit of Producers Finance Corporation	R 195	R 195	R 195	

Exhibits Which Are Part of Record (Continued)

Number of Exhibit	Description	Page References to the Record			
		Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
Plaintiff's Exhibits:					
A	Tax protest dated October 10, 1951	R 137			
B	H. Koch & Sons partnership return for 1946	R 141	R 141	R 141	
C	H. Koch & Sons partnership return for 1947	R 141	R 141	R 141	
D	Maurice P. Koch return for 1946	R 141	R 141	R 141	
E	Maurice P. Koch return for 1947	R 141	R 141	R 141	
F	Articles of Incorporation of Beacon Pictures Corporation	R 150, 151	R 150, 151	R 151	
G	Default Judgment against Beacon Pictures Corporation in favor of Maurice P. Koch	R 156	R 156	R 158	
H	Letter dated January 29, 1948, to Jack Chertok from Producers Finance Corporation	R 173	R 173	R 173, 174	
I	Check of Producers Finance Corporation to Max Fink dated July 8, 1948, for \$8,000.00	R 176	R 176	R 176	
J	Partnership Agreement between David Hersch and David Sebastian	R 248	R 248	R 248	
K	Certified copy of referee's claim register in bankruptcy proceedings of Beacon Pictures Corporation	R 260	R 260	R 260	

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v

Appendix A

PLAINTIFFS' NO. 1—IN EVIDENCE

THIS AGREEMENT entered into this 31st day of December, 1941, by and between REBECCA KOCH, MAURICE P. KOCH, HAROLD M. KOCH, and WILLIAM L. KOCH, all of the City and County of San Francisco, State of California,

WITNESSETH:

WHEREAS, all of the parties hereto are brothers and sisters, and all are the recipients of a gift from their parents HERMAN KOCH and CELIA KOCH, the subject of which gift is that certain business known as HERMAN KOCH & SONS; and

* * * * * *

Each and all of said parties agree, in consideration of the mutual promises and agreements from each of said parties, to the others, that his interest in said business shall continue only for such a period of time as he or she shall remain in active participation of said business, * * * it being further understood that in the event any of said partners disassociates himself from said business voluntarily that his interest in said business immediately ceases and determines, and there shall be paid to said party for his interest in said business, regardless of the value of his interest therein, the sum of \$1000.00. It being further understood that in the event one of the parties hereto leaves said business, that the interests of said parties remaining shall be equal; it is further understood that the voluntary remaining away from said business for a

period of sixty days or more shall be deemed a prima facie withdrawal and disassociation from said business by the party so remaining away, and that at the expiration of the said sixty days his interest in said partnership business is subject to divestment.

* * * * *

As compensation for services rendered by the parties in connection with said firm business, the salaries and drawings of said parties shall be as follows:

To REBECCA KOCH	\$70.00 per week;
To HAROLD M. KOCH	\$70.00 per week;
To WILLIAM L. KOCH	\$70.00 per week;
To MAURICE P. KOCH	\$100.00 per week

as salary, and \$100.00 per month as and for city and local sales expense, which said sum of \$100.00 per month is payable on the 1st day of each month in advance, * * * In addition to the foregoing, the said Maurice P. Koch shall receive from the firm the sum of \$2100.00 annually as and for traveling and sales expense, which said sum is payable as needed by the said Maurice P. Koch while on the road traveling for said firm.

* * * * *

It is further understood and agreed that all of said parties hereto shall devote all of their time to the interests of the said business and for the benefit thereof.

* * * * *

In the event any dispute of any kind, nature or character, specifically including any dispute which

may arise as to any of the parties hereto losing his interest in said business by violation of the terms of this agreement, any and all such disputes shall forthwith, by any of the parties hereto or by any party interested in this or any other agreement made this date, or as heirs of any of the parties hereto shall be referred to MORRIS M. GRUPP for arbitration and decision.

* * * * *

Appendix B

PLAINTIFFS' NO. 2—IN EVIDENCE AMENDMENT TO AGREEMENT OF DECEMBER 31, 1941

THIS AGREEMENT entered into this 23rd day of October, 1944, by and between REBECCA KOCH, MAURICE P. KOCH, HAROLD M. KOCH AND WILLIAM L. KOCH, copartners, doing business under the fictitious firm name and style of H. KOCH & SONS, all of the City and County of San Francisco, State of California

WITNESSETH:

WHEREAS, it is the desire of the partners above named, and each of them, to enlarge the scope of their partnership business and activities and to amend the existing Articles of Partnership accordingly.

NOW, THEREFORE, in consideration of their mutual covenants and agreements the parties hereto, each for himself, agrees that the existing Articles of Copartnership, dated December 31, 1941, be amended to include therein the following:

1. The said partnership business will, in addition to engaging in those activities referred to in the existing partnership agreement, engage in the business of financing motion picture productions * * *.

2. The assets of the partnership are to be available in the operation of this new business activity. It being understood further that nothing herein to the contrary withstanding, if any individual partner

or partners desires to advance any sums toward the abovementioned business activity over and above the sum advanced by this partnership that the profits realized on such sums advanced by the individual partners or the partnership shall be divided as follows:

(a) Moneys advanced by individual partners over and above the sum advanced by the partnership shall be first refunded to such partner or partners individually;

(b) The profits realized from that portion of the money advanced by the partnership or by the individual partners in equal sums each to the other shall upon realization of such profits become partnership assets;

(c) The profit on such sum or sums advanced by any one or more partners over and above that advanced by the other partner or partners shall belong to the individual partner or partners so advancing any excess;

(d) The losses on such sums advanced by the partnership or the sums advanced by individual partners to the extent that such sums so advanced by the individual partners are equal to that advanced by all the other partners shall be borne by the partnership and by the partners thereof equally. The losses on any sums advanced by individual partners over and above that advanced by the other partner or partners equally shall be borne wholly by said partner or partners so advancing such excess.

3. Maurice P. Koch is hereby appointed manager of that portion of the partnership business referred to in this Amendment and any expenses he may incur by reason of the management of this branch of the said business shall be borne by the said partnership in addition to any expenses heretofore provided in the original partnership agreement.

4. As such General Manager the said Maurice P. Koch is hereby authorized to deal in his own name with any person, firm or corporation with relation to the business herein referred to. It being understood and agreed that in so dealing in his own name the said Maurice P. Koch is acting as the agent of the said partnership and the agent of the individual partners thereto and that any funds received by him, any stocks or bonds or notes or other evidences of indebtedness, any contracts or licenses he may secure in his own name as a result of the proceeds of this partnership or the individual partners shall to the extent of the advance of moneys by this partnership or the individual partners be and remain the property of the partnership or the individual partners, notwithstanding that the same may on the written evidences of indebtedness or contracts stand in the name of Maurice P. Koch.

5. It being understood, however, in this connection that the said Maurice P. Koch will not enter into any transaction on behalf of said partnership without the consent of a majority of the partners and it being further understood that the said Maurice P. Koch is

to receive no increase in compensation for time devoted to this branch of the business.

EXECUTED by the parties hereto the day and year first above written.

Rebecca Koch

Maurice P. Koch

Harold M. Koch

William L. Koch

Appendix C

PLAINTIFFS' NO. 3—IN EVIDENCE

THIS AGREEMENT entered into this 23rd day of October, 1944, by and between DAVE SEBASTIAN of the City of Beverly Hills, County of Los Angeles, State of California, and AL KANTROW, MAURICE P. KOCH, REBECCA KOCH, HAROLD M. KOCH, WILLIAM L. KOCH, JACK SILVERMAN, AL BACH, MAX GOTTLIEB, SAUL BAROFF, and MANUEL ROBINSON, all of the City and County of San Francisco, State of California, and HERMAN SALKIN of Redwood City, California, ROY HALLER, of Oakland, County of Alameda, State of California, MOE GOTTLIEB, of Ventura, California, MACK GILSON, of Oxnard, California, and HOBART W. RUDE, LOUIS LUBIN and SAM BRAUNSTEIN all of the City of Los Angeles, County of Los Angeles, State of California.

* * * * * *

Said partnership shall be known as "PRODUCERS SYNDICATE".

* * * * * *

3. The business of the partnership shall be to purchase an interest in the Sid Broad Production, "untitled," of a minimum of twenty per cent (20%) of the producer's share or cut in said production, and said money to be invested in this partnership is to be used specifically under the terms and conditions hereinafter set forth.

The further business of this partnership shall at the option of the partners, be the production of other motion pictures subsequent to the completion of the first picture by the Sid Broad Productions.

* * * * *

11. It is understood and agreed that all of the monies of this partnership shall be placed under the exclusive control of Morris M. Grupp, who shall open a bank account under the name of this partnership, and shall have the right to draw upon said funds under the following conditions:

* * * * *

B. The full sum to wit: \$50,000.00 shall be delivered to Dave Sebastian in full by the said Morris M. Grupp under the following conditions:

(1) When the said Morris M. Grupp is satisfied that the said Dave Sebastian has obtained, or will, simultaneously, upon the delivery of said money to the Sid Broad Productions, obtain the following contracts or assurances in writing:

(a) That full provisions have been made by the producer, to wit: Sid Broad, or by his agents, for the obtaining of any balance of monies necessary to produce the picture intended to be produced, over and above the \$50,000.00 to be delivered to the said Dave Sebastian. Said balance of such monies to be obtained by said producer either by deferments, loans or otherwise.

* * * * *

Appendix D

PLAINTIFFS' NO. 5—FOR IDENTIFICATION

AGREEMENT

Dated April 16th, 1946

By and Between
Producer SAM COSLOW

with a place of business and address for all purposes hereunder at Hollywood, California

and

United

United Artists Corporation

a Delaware corporation, with its place of business and address for all purposes hereunder at 729 Seventh Avenue, New York City, New York.

* * * * *

THE PRODUCER

The description and provisions concerning the Producer are set forth in Schedule "B" attached hereto.

SPECIFICATIONS AND DESCRIPTION OF MOTION PICTURES TO BE DELIVERED

The description of the motion pictures to be delivered hereunder, the conditions concerning such motion pictures, the type and quality of the motion pictures, the number of motion pictures and time of delivery of those motion pictures are set forth in Schedule "B".

GRANT

The Producer grants to United and United accepts from the Producer the sole and exclusive right, license and privilege to exploit, distribute, exhibit and market, and cause to be exploited, distributed, exhibited and marketed the motion pictures specified herein in the entire world, including specifically the territories set forth in Schedule C hereto attached on both standard and sub-standard widths and both theatrical and non-theatrical, together with the right to re-issue same for a period of seven (7) years from the general release date of each said motion picture in the United States.

* * * * *

- 1) THE PRODUCER represents and warrants that it owns the sole and exclusive license to produce a motion picture entitled "COPACABANA" which he will produce, and that Carmen Miranda, Dennis O'Keefe and Andy Russell will be starred in said motion picture, and when completed will deliver said picture to United for distribution which United agrees to accept for distribution.
- 2) The PRODUCER represents and warrants that he will have the controlling interest in the corporation which produces said picture.

* * * * *

PRODUCER'S RIGHT TO ASSIGN

a) Nothing herein contained shall be deemed to limit the right of the Producer to assign all of its right, title and interest in and to any motion picture, including the copyright thereto, the negative and positive copies thereof and that portion of the gross receipts payable to the Producer hereunder, to any company or corporation, provided, however, such company or corporation shall, at the time of such assignment be wholly owned or wholly controlled by Producer and provided, further, that should such company at any time cease to be wholly owned or wholly controlled by Producer, then and in that event the rights so assigned to it shall immediately revert to and revest in the Producer, and that such assignment shall be subject to such reversion and to the condition that the assignee company or corporation shall have no right to assign all or any right so assigned to it other than to the Producer. It is further agreed that any such assignment shall be subject to the rights of United hereunder and under any modifications thereof or amendments thereto, and shall not operate to relieve the Producer of any of its obligations hereunder.

b) Nothing herein contained shall be deemed to limit the right of the Producer to assign all of its right, title and interest in and to any motion picture, including the copyright thereto, the negative and positive copies thereof and that portion of the gross receipts payable to the Producer hereunder, to any bank or other person, firm or corporation, as collateral

security for a loan; provided, however, that any such assignment shall be made subject to the rights of United under this agreement and any modifications thereof or amendments thereto, and that it shall not operate to relieve the Producer of any of its obligations hereunder.

c) Nothing herein contained shall be deemed to prevent or prohibit the Producer from assigning to any person, firm or corporation all or any part of the Producer's interest in the receipts or proceeds of any completed motion picture. Any such assignment shall, of course, be made subject to the rights of the United under this agreement and any modifications thereof or amendments thereto, shall not operate to relieve the Producer of any of his obligations hereunder.

Appendix E

PLAINTIFFS' NO. 19—FOR IDENTIFICATION

THIS AGREEMENT, made and entered into this day of, 1947, by and between MAURICE P. KOCH, hereinafter referred to as "KOCH", ALFRED E. GREEN, hereinafter referred to as "GREEN", DAVID A. SEBASTIAN, hereinafter referred to as "SEBASTIAN", and SIDNEY ROSS, hereinafter referred to as "ROSS."

This Agreement is made in contemplation of the following facts:

1) GREEN, SEBASTIAN and ROSS are officers and three of the directors of AMBASSADOR PRODUCTIONS, INC., a California corporation, hereinafter referred to as "CORPORATION."

2) That the sole stockholder of the said CORPORATION is MAURICE P. KOCH, who owns Five Hundred (500) shares of the common stock of said CORPORATION, having paid the sum of FIFTY (\$50.00) DOLLARS per share for said stock.

3) That the parties hereto are desirous of entering into an arrangement by which GREEN, SEBASTIAN and ROSS shall have an option to purchase a portion of the stock owned by KOCH.

NOW, THEREFORE, in consideration of the premises and the covenants hereinafter set forth, it is agreed as follows:

* * * * * *

Appendix F

PLAINTIFFS' NO. 21—FOR IDENTIFICATION

Los Angeles, California

April 28, 1947

Mr. Alfred E. Green
Los Angeles, California

Dear Sir:

This will confirm your employment agreement with us as follows:

1. We hereby employ you to render your exclusive services for us as the producer and director for a period of three (3) years for and in connection with the preparation, production, direction and completion of not more than six (6) feature length motion picture photoplays in said period and in such other capacities relating to the preparation, production and completion of the photoplays as we may from time to time designate.

* * * * * *

Your signature affixed at the place indicated will constitute this a binding agreement between us.

Very truly yours,
AMBASSADOR PRODUCTIONS, INC.
By

ACCEPTED AND AGREED TO:

.....
Alfred E. Green

Appendix G

PLAINTIFFS' NO. 26—FOR IDENTIFICATION

September 25, 1947

Mr. Max Fink
6253 Hollywood Blvd.
Los Angeles, 28, California

Dear Max:

I am pleased to enclose for your inspection a draft of the proposed contract for two pictures to be supervised by Jack Chertok. I call your attention to the fact that the submission of the enclosure to you at this time is unofficial for the reason that this draft has not as yet been approved by Monogram.

After you have had a chance to go over this contract, please contact me so that we may discuss any questions which you may have concerning it.

Please excuse the delay in forwarding this instrument to you.

Kindest regards.

Sincerely,

Barney

BARNETT SHAPIRO - RESIDENT
ATTORNEY

BS:jt

Enclosure

AMBASSADOR PICTURES

Los Angeles, California

Gentlemen:

The following is our agreement:

SECTION I
PRODUCTION

1. You agree to produce and deliver to us for distribution by us two (2) motion picture photoplays. Said photoplays are hereinafter for convenience referred to as "the pictures".

* * * * *

5. The first of the pictures shall be delivered to us not later than six (6) months after the date hereof, and the remaining picture shall be delivered not later than twelve (12) months from the date hereof.

* * * * *

Appendix H

PLAINTIFFS' NO. 29—FOR IDENTIFICATION

November 19, 1947

Mr. Max Fink

c/o Fink, Rolston, Levinthal & Kent

6253 Hollywood Blvd.

Los Angeles 28, Calif.

Dear Max:

I am pleased to re-submit herewith for your perusal a draft of the proposed contract by and between Ambassador Pictures and us with respect to the production and distribution of two photoplays.

In accordance with our discussion relative to changes, you will note that changes and revisions have been made on pages 5, 6, 8, 9, 10, 19 and 35. I believe that the enclosure now conforms to our discussions relative to this contract.

* * * * *

Appendix I

PLAINTIFFS' NO. 24—FOR IDENTIFICATION

October 17, 1947.

Mr. Max Fink,
6253 Hollywood Blvd.,
Los Angeles, 28, California.

Dear Mr. Fink: Re: HILL OF THE HAWK—by
 Scott Odell

* * * * * *

you asked me to give you the information that you need for drawing up the contracts for the motion picture sale of HILL OF THE HAWK:

As you know, the deal that I made with Mr. Chertok was for \$25,000.00 cash and five percent of the net profits of the picture. Of course by the net profits of the picture, we mean the amount remaining after the deductions for distribution charges and the negative cost of the picture, and the amount spent for prints and advertising.

* * * * * *

This contract may be assigned by Mr. Chertok to another person or corporation provided, of course, said person or corporation take over all of the obligations of the contract.

It is impossible for me to discuss all of the clauses in the contract until you draw the papers and send me a copy. If there is any point that needs clearing up at that time, we can make the necessary changes in the contract. But with this information you should be able to get the papers ready to send us next week. Please tell Mr. Chertok that the 8 copies of HILL OF THE HAWK he wanted are on the way to him.

* * * * * *

Annie Laurie Williams

Appendix J

PLAINTIFFS' NO. 13—IN EVIDENCE

H. KOCH and SONS

No. 742

Manufacturers of

The Original Aviation Luggage

73 Beale Street

San Francisco, California, Oct. 16, 1946

Pay to the order of

David Sebastian

\$30,000 00/100

The Sum of \$30000 and 00 cts

Dollars

Market-Ferry Office 11-153

American Trust Company

Head Office San Francisco

San Francisco, California

H. Koch and Sons

Rebecca Koch

*

*

*

*

*

*

*

Appendix K

PLAINTIFFS' NO. 10—IN EVIDENCE

Murray P Koch Personal

Care Koch and Son 73 Beale St SFran=1946

Aug 4 PM 8 46

Kindly instruct David Sebastian return immediately.
He bring 50,000. Will not give beacon until properly
secured.

* * * * *

Appendix L

PLAINTIFFS' NO. 12—IN EVIDENCE

\$50,000.00 Los Angeles, Calif., August 31, 1946
.....after date, for value received BEACON
PICTURES CORPORATION promise to pay to
MURRAY P. KOCH or order at Los Angeles, Cali-
fornia Fifty Thousand and 00/100 Dollars.

* * * * * *

Appendix M

PLAINTIFFS' NO. 14—IN EVIDENCE

\$30,000.00 Los Angeles, Calif., October 17, 1946
after date, for value received BEACON
 PICTURES CORPORATION promise to pay to
 MURRAY P. KOCH or order at Los Angeles, Cali-
 fornia Thirty Thousand and 00/100 Dollars.

* * * * * *

Appendix N

PLAINTIFFS' NO. 16—IN EVIDENCE

THIS AGREEMENT entered into on the 31 day of August, 1946, between MURRAY P. KOCH, hereinafter referred to as "Lender", and BEACON PICTURES CORP., a corporation, hereinafter referred to as "Beacon".

* * * * *

Appendix O

PLAINTIFFS' NO. 17—IN EVIDENCE

Mr. Murray P. Koch
Los Angeles, California

Dear Mr. Koch:

This letter will supplement, amend and/or modify that certain agreement between us dated August 31, 1946, pursuant to which you loaned to us the sum of \$50,000.00. You have agreed to lend or advance to us concurrently with the execution of this supplemental agreement, and we hereby acknowledge receipt thereof, an additional sum of \$30,000.00, making a total loan of \$80,000.00; said additional \$30,000.00 to be used for the same purposes and pursuant to the same terms and conditions set forth in the aforesaid agreement dated August 31, 1946. Our agreement, therefore, is as follows:

* * * * *

Appendix P

PLAINTIFFS' NO. 6—IN EVIDENCE

MAURICE P. KOCH	23815H
73 Beale Street	No. 0274
San Francisco, Calif., April 25, 1946	
Pay to the order of	
David A. Sebastian	\$15,000 00/100
Fifteen-thousand	00/100 Dollars
Pacific National Bank	
of San Francisco	H. Koch & Sons
11-39 San Francisco, Calif.	Maurice P. Koch
* * *	* * *

Appendix Q

PLAINTIFFS' NO. 8—IN EVIDENCE

H. KOCH and SONS

No. 23822

Manufacturers of

The Original Aviation Luggage

73 Beale Street

San Francisco, Cal., May 22, 1946

Pay to the order of

David Sebastian

\$2500 00/100

The Sum of \$2500 and 00 cts

Dollars

To

Pacific National Bank of San Francisco

H. Koch and Sons

11-39 San Francisco, Cal.

Maurice P. Koch

*

*

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*

*

*

*

Appendix R

PLAINTIFFS' NO. 10A—IN EVIDENCE

<p>H. KOCH and SONS</p> <p>Manufacturers of</p> <p>The Original Aviation Luggage</p> <p>73 Beale Street</p> <p style="text-align: right;">San Francisco, Cal., Aug. 5, 1946</p> <p>Pay to the order of</p> <p>David A. Sebastian</p> <p style="text-align: right;">\$50,000 00/100</p> <p style="text-align: right;">The Sum of \$50,000 and 00 cts Dollars</p> <p>To</p> <p>Pacific National Bank of San Francisco</p> <p style="text-align: right;">H. Koch and Sons</p> <p>11-39 San Francisco, Cal. Rebecca Koch</p>	<p>No. 24004</p>
--	------------------

* * * * * * *

Stub:

Date	Description	Amount
8/5	In line with	
	understandings	
	arrived at re	
	Copacabana	
	picture	

Total 50,000 00

No. 15,645
United States Court of Appeals
For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

APPELLEE'S BRIEF.

CHARLES K. RICE,
Assistant Attorney General,

LLOYD H. BURKE,
United States Attorney,

LYNN J. GILLARD,
Assistant United States Attorney,

MARVIN D. MORGENSTEIN,
Assistant United States Attorney,

422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,

Attorneys for Appellee.

FILED

MAY -1 1958

PAUL P. O'BRIEN, CLERK

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No. 15,645

**United States Court of Appeals
For the Ninth Circuit**

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

APPELLEE'S BRIEF.

JURISDICTION.

On July 5, 1955 in the United States District Court for the Northern District of California, Southern Division, the appellants filed an action for recovery of federal income taxes alleged to have been erroneously assessed and collected. Jurisdiction was invoked pursuant to 28 U.S.C. § 1346(a)(1) (1952). Trial by jury was demanded by the appellants, and the action was tried before the court and a jury on November 26, 27, 28 and 29. The jury returned a verdict in

favor of the appellee and on January 23, 1957 judgment was entered in favor of the appellee. A motion for new trial was filed and served on February 1, 1957, and denied on March 5, 1957. On April 18, 1957 the appellants filed a notice of appeal. Jurisdiction is invoked pursuant to 28 U.S.C. § 1291 (1952).

STATEMENT OF THE CASE.

Appellants are a copartnership engaged in the business of luggage manufacturing. (Exhibit 1.) On October 23, 1944 the partnership agreement was amended to permit the partnership to engage in the business of financing motion pictures through direct participation, stock investment or loans. Two of the factors necessitating an amendment were the provisions in the original agreement that no partner could remain away from the business 60 days and that all of the partners must devote all of their time to the business. (Exhibit 1, pages 2 and 3.)

In April, 1946 Beacon Pictures Corporation, a corporation, was formed to engage in the production of motion pictures. The partnership did not engage in the organization of that corporation. (R. 147-148.) This action is based upon an alleged loss of \$90,000 through loans to Beacon Pictures Corporation. The loans were made in the following manner:

On April 25, 1946 the partnership issued a check payable to Mr. David Sebastian in the amount of \$15,000.00. (R. 47-50.) \$10,000.00 of this amount was

a loan to the partnership of David Hersch and Sam Coslow to set up Beacon Pictures Corporation. The remaining \$5,000.00 was a loan to Hersch and David Sebastian for expenses in commencing production. (R. 50.) An additional \$2,500.00 was loaned to Hersch and Sebastian for the same purpose. (Exhibit 8, R. 53.) The loan of \$10,000.00 to Hersch and Coslow was to be repaid by Hersch and Coslow when the picture was completed and sold. (R. 52.) The partnership thereafter drew checks in the amount of \$50,000.00 (Exhibit 10-A, R. 55-56) and \$30,000.00 (Exhibit 13, R. 68-69) to the order of Sebastian. The partnership received notes from Beacon Pictures Corporation for these two loans of \$50,000.00 and \$30,000.00. (Exhibits 12, 14; R. 68-69.) The partnership advanced an additional \$20,000.00 to Beacon Pictures Corporation, which amount was returned. (Exhibit 18, R. 74-75.)

The picture was completed, distributed, and was a failure. The partnership obtained a judgment against Beacon Pictures Corporation for \$80,000.00 (R. 157) and filed a claim against the bankrupt estate of Beacon Pictures Corporation. Subsequently it was determined that the loans to Beacon Pictures Corporation were worthless.¹ This is the loss which is the basis of the appellants' claim for refund. In addition, the taxpayers claimed as a loss the \$15,000.00 originally loaned to Hersch and Sebastian (see above)

¹Appellants loaned \$97,500. Evidently \$7,500 of this represented loans made by Roy Haller (R. 277-279). This \$80,000 judgment against Beacon Pictures Corporation contained a \$5,000 claim of Roy Haller.

claiming that those loans were in fact made to Beacon Pictures Corporation.²

In addition to their isolated loan to Beacon Pictures Corporation, the appellants claim to have been engaged in the business of financing motion picture ventures. This claim of a business is based upon the following activity. Ambassador Productions, Inc. was formed and all shares of stock were issued to Maurice P. Koch. (R. 83.) This corporation purchased the rights to the book "Hill of the Hawk". (R. 93.)

A second corporation, Producers Finance Corporation, was formed in October, 1947. (R. 96.) Maurice P. Koch was president of that corporation from the moment of its inception. (R. 165.) As president of Producers Finance Corporation, Maurice P. Koch introduced Mr. Jack Chertok of Apex Film Corporation to the officers of the Pacific National Bank to secure a loan for Apex Film Corporation. (R. 174-175.) At this time, Apex Film Corporation had already been formed, and had made preparations to produce films. (R. 174.) Maurice P. Koch's only interest in this transaction was as a creditor of Apex Film Corporation. (R. 173-174.)

²In the complaint, the appellants alleged a \$90,000 loss. The appellee admitted this loss. In the course of the trial, the evidence disclosed that the loans were made to Hersch and Sebastian and Hersch and Coslow. The appellee moved the court to permit an amendment to the answer denying that the \$15,000 loss was suffered by the appellants. (R. 289-290.) This motion was denied. (R. 292.) Although the court failed to state the reason for this ruling, it was probably that since the court was directing a verdict as to the \$15,000 in dispute, there was no necessity for permitting an amendment to the answer in relation to that amount.

To further impress upon the jury that the appellants were in the business of financing motion picture ventures, there was testimony of numerous conversations, discussions, airplane journey and midnight phone calls by Maurice P. Koch. (See, for example, R. 202.) However, during much of this time, Maurice P. Koch was an officer and director of Producers Finance Corporation and Ambassador Pictures Corporation. (R. 167.)

The appellants filed income tax returns for the years 1945 and 1947. They thereafter amended these returns claiming a deductible loss for the year 1947 and a net operating loss carryback for the year 1945 arising out of the transaction involving Beacon Pictures Corporation. The claims for refund were denied upon the ground that that loss was a non-business bad debt. The appellants thereupon filed this action seeking refund of the tax paid.

In the complaint, the appellants also asserted that the loss was a loss arising out of a transaction entered into for profit within the meaning of Section 23(e) (2) of the Internal Revenue Code of 1939. Prior to trial counsel for the appellants agreed that this issue was being withdrawn from the action. Appellants state that no such stipulation was made. (See Appellants' Opening Brief, pages 58-59.) Unfortunately, the stipulation was not in writing. However, the instructions proposed by the appellants and the appellee, and the interrogatories submitted to the jury all omitted any reference to whether the transaction was in fact a transaction entered into for profit rather

than a debt. The conclusion is obvious that such a stipulation was made.

At the close of the evidence, the appellee moved (1) for a directed verdict as to all appellants and (2) to amend the answer to deny that Maurice P. Koch lost \$15,000 in addition to the \$75,000 lost by the partnership. The motion to amend was denied, and the motion for a directed verdict was granted against Maurice P. Koch and Daisy Koch for the \$15,000 which they claimed in addition to a share of the partnership loss. The jury then returned with a verdict that H. Koch and Sons was not regularly engaged in the business of financing motion picture ventures.

SUMMARY OF THE ARGUMENT.

1. (a) The appellants should not be permitted to allege error in the instruction that there is presumption that the determination by the Commissioner of Internal Revenue is correct and the appellants must overcome that presumption by a preponderance of the evidence. The appellants failed to object to the instruction when it was given. Therefore, they are precluded from challenging the instruction for the first time in this court.

(b) Assuming that the appellants may raise an objection to the instruction, the instruction was not erroneous. The instruction did not purport to give any weight as evidence to the Commissioner's presumption. The instruction stated that the appellants

had the burden of proving by a "preponderance of the evidence" that they were engaged in the trade or business of financing motion pictures. This did no more than state the burden placed upon a plaintiff in a civil action.

2. The directed verdict against Maurice P. Koch and Daisy Koch did not prejudice any of the appellants.

(a) The directed verdict did not prejudice the partnership. Maurice P. Koch testified that on all occasions he was acting on behalf of the partnership. (Appellants' Opening Brief, page 57.) None of the testimony of Maurice P. Koch was excluded. Thus, the jury considered all the testimony of Maurice P. Koch, in which he stated he was acting solely for the partnership, to determine whether or not the partnership was engaged in the business.

(b) Maurice P. Koch and Daisy Koch were not prejudiced by the directed verdict. Maurice P. Koch never claimed to have been acting for himself. He based his claim of a trade or business upon his identity with the partnership. Therefore, the directed verdict against Maurice P. Koch is immaterial since he is bound by the jury verdict that the partnership was not engaged in the business.

3. The court did not err in the instruction that the jury could disregard any of the activities of Maurice P. Koch where the jury believed he was acting on his own behalf and not on behalf of the partnership. Everything that Maurice P. Koch did, he did

in his own name. In fact, he advanced monies without the knowledge of the partnership. There was no evidence that the partnership acquiesced in all his activities. The ultimate issue must remain with the jury. The partnership agreement was only one of the factors they were warranted in considering to determine whether he was always acting for the partnership.

4. There was no error in the court's failure to give the three instructions requested by the appellants that in determining whether or not the appellants were engaged in the business of financing, the jury must consider all activity whether or not the transactions were actually concluded. The court permitted testimony of discussion, documents, telephone calls, all concerning activity where no proof was made that money was invested. In its charge, the court then stated to the jury that it could consider all of the time and effort devoted by the appellants. There was no restriction that actual financing must have occurred.

5. The argument to the jury by appellee's counsel concerning the activity of the Commissioner of Internal Revenue was not improper. Counsel was merely commenting upon the fact stated in the appellants' pleading. As such, it is proper comment to the jury.

6. The rulings of the court in relation to evidence received or excluded were proper. Documents excluded had no foundation and had no relevance to the trade or business of the partnership.

7. The jury's verdict is supported by the evidence. The existence of a partnership agreement alone cannot transcend any factual inquiry into whether or not the appellants actually did engage in a business. The jury observed the witnesses testify to the amount of time and effort expended in financing motion picture ventures. The trial court was liberal in permitting the jury to consider testimony of activity of separate and distinct corporate entities. The issue was a factual one and should be left to the jury to decide whether or not the appellants were engaged in the trade or business of financing motion picture ventures.

8. The court could have properly directed a verdict against appellants, but was generous in permitting the issue to be decided by the jury.

ARGUMENT.

1. THE INSTRUCTION CONCERNING THE EFFECT OF THE COMMISSIONER OF INTERNAL REVENUE'S DENIAL OF THE REFUND CLAIM IS NOT GROUNDS FOR REVERSAL.

- (a) Neither of appellants' counsel objected to the instruction when it was given by the court. They are precluded from now raising it for the first time.

When the court concluded instructing the jury, counsel were given an opportunity to raise objections. (R. 306.) Counsel for the appellants excepted to instructions given and also took exception to the court's failure to give instructions. At no time did they raise

any objection to the instruction to which they now complain.

Rule 51 of the Federal Rules of Civil Procedure provides in part:

“No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”

Fed. R. Civ. P. 51.

And, Rule 18(d) of this court provides in part:

“When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial.”

Appellants' counsel failed to object as provided by Rule 51 of the Federal Rules of Civil Procedure, and accordingly are unable to comply with the requirements of Rule 18(d) of the Rules of the United States Court of Appeals for the Ninth Circuit.

This court has long required compliance with Rule 51 of the Federal Rules of Civil Procedure. A failure to object to the instruction when given precludes raising any objection to that instruction at the time of appeal.

Persons v. Gerlinger Carrier Corp., 227 F.2d 337 (9 Cir. 1955);

Lloy v. Pacific Electric Railway Co., 207 F.2d 662 (9 Cir. 1953);

Wood Workers Tool Works v. Byrne, 191 F.2d 667, 676 (9 Cir. 1951);

Lynch v. Oregon Lumber Company, 108 F.2d 283, 286 (9 Cir. 1939).

See also:

Macartney v. Compagnie Generale Transatlantique, 9 Cir. Feb. 28, 1958;

United Press Associations v. Charles, 245 F.2d 21 (9 Cir. 1957).

In *Macartney v. Compagnie Generale Transatlantique*, decided February 28, 1958, this court stated,

“Our view of the propriety of the court’s action in giving supplementary instructions in open court in the absence of counsel and any objection by such counsel makes it unnecessary to rest our affirmance upon the nature and content of the supplementary instructions.”

In a footnote to that statement, this court stated,

“In *Hutchinson v. Pacific Atlantic Steamship Company*, 217 F.2d 384 (1954), this court said: ‘As to the alleged error of the court in giving certain instructions: Appellant made no objection to the instruction she now complains of. In fact, she informed the court she had no objections. She should not now be heard to complain.’ [page 386.]”

Thus, as recently as February 28, 1958, the court reaffirmed its position that in order to raise an objection to an instruction, the appellant must have made formal objection to the instruction in the trial court.

- (b) Assuming that appellants may for the first time in this court inquire into the propriety of the instruction, the instruction does not constitute sufficient ground to reverse the jury's verdict.

The charge to which the appellants now complain was as follows:

“The burden of proof in this case is upon the plaintiffs to prove by a preponderance of evidence that the loan by plaintiffs to the Beacon Pictures Corporation was a loan made to plaintiffs' regular trade or business. There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion pictures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by a preponderance of evidence that they were engaged in the trade or business of financing motion pictures.” (R. 301.)

The court then went on to discuss what it meant by evidence and a preponderance of evidence saying:

“By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon which the burden rests. Preponderance of evidence means not the greater number of witnesses but the greater weight, probability, quality and a convincing effect of the evidence and proof offered by the party holding the affirmative as compared with any opposing evidence. If the scales of proof hang evenly the verdict should be against the party who has the burden of proof.

In determining whether any issue has been proven by a preponderance of evidence you should consider all of the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself.” (R. 302.)

The court did not instruct the jury that the presumption was to be considered as evidence in the case.

If appellants thought there was any error in this instruction they could easily have called it to the court’s attention. Instead they would now set aside a four-day trial on the basis of such an afterthought and on an alleged ground which obviously did not appear to them to be objectionable or prejudicial at the time the jury was charged. Appellants did not request explanation of the instruction as given. Instead, they remained mute.

In any event, the jury was not instructed that the presumption was to be given evidentiary weight, and the instruction did not convey that impression to them.³

³A comparison of the instruction given by the court with instructions given by California courts in certain cases where a presumption does carry evidentiary weight will indicate this. For example, the inference of *res ipsa loquitur* is evidence to be considered by the jury. The jury is therefore charged: “An inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference itself is a form of evidence, and if none other exists tending to overthrow it . . .” California Jury Instruction Civil 206-B (4th Rev. Ed. 1956) . . . Similarly, in California there is a presumption that every person acts free of contributory negligence. Therefore, the jury is instructed as follows: “At the outset of the trial, each party was entitled to the presumption of law that

The trial court was clearly correct in instructing the jury as to burden of proof and preponderance of the evidence. In a refund suit it has repeatedly been held that the burden is on the taxpayer to establish his right to recover and the amount of the refund.

Helvering v. Taylor, 393 U.S. 507 (1935);

Maroosis v. Smyth, 187 F.2d 228, 231-232 (9th Cir.), cert. denied 324 U.S. 814 (1951).

2. **THE DIRECTION OF A VERDICT AGAINST MAURICE P. KOCH AND DAISY KOCH INDIVIDUALLY DID NOT PREJUDICE ANY OF THE APPELLANTS.**

The complaint sought recovery for taxes paid because of an alleged loss in the amount of \$15,000 individually on behalf of Maurice P. Koch and Daisy Koch. This \$15,000 allegedly represented loans by Maurice P. Koch to Beacon Pictures Corporation in excess of his proportionate share of the partnership loan. The court directed a verdict as to this amount. (R. 292.) The record warranted this ruling on any of the following grounds:

(1) These were not loans to Beacon Pictures Corporation but loans to David Sebastian;

(2) There was insufficient proof that these loans were made by Maurice P. Koch and were not, in fact, loans of the partnership; or

every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of a prima facie evidence and will support findings in accordance therewith . . .” California Jury Instruction Civil 135 (4th Rev. Ed. 1956). These are instructions which tell the jury to give evidentiary weight to a presumption. The instruction given by the court in this action was not similar to these instructions and did not have the same effect.

(3) Maurice P. Koch never claimed to have been in the trade or business of financing motion pictures apart from his activities in the partnership.

Whatever the basis for the ruling, it is immaterial since no prejudice resulted to the appellants Maurice P. Koch and Daisy Koch or to the partnership H. Koch and Sons.

(a) The partnership was not prejudiced.

Maurice P. Koch was never acting on his own behalf. All of his activities were on behalf of the partnership. (R. 25, Appellants' Opening Brief 25, 33.) Although the court directed a verdict against Maurice P. Koch and Daisy Koch individually, the jury was permitted to consider all the activities of Maurice P. Koch in furtherance of the partnership business. The jury was instructed:

“Taxpayers may act through employees, agents and other persons, firms and corporations appointed by such taxpayers, and the acts of such employees, agents, or other persons, firms or corporations appointed by the taxpayer are in contemplation of law the act of the taxpayer. Thus, in considering the activities of the taxpayers in the instant case with relationship to the conduct, if any, of the business or enterprises, you are required to consider that the act of any such employees, agents, persons, firms or corporations appointed by them are in fact the acts and activities of the taxpayers.

“The authorized act or acts of any one partner of H. Koch and Sons in connection with the

partnership business or activities, are in contemplation of law the act or acts and activities of all of the partners.” (R. 301.)

Thus, the jury was instructed to consider all the activities of Maurice P. Koch where it believed he was acting in furtherance of partnership interests in determining whether the partnership was engaged in the business of financing motion picture ventures. The partnership conducted its activities in the business of motion picture financing through the activities of Maurice P. Koch. Since the jury considered all of Maurice P. Koch’s testimony, the partnership had the benefit of all evidence which was introduced.

(b) Maurice P. Koch and Daisy Koch were not prejudiced.

All of Maurice P. Koch’s activity was on behalf of the partnership. He never purported to act for his own interests. Therefore, any finding on the partnership’s business would be a finding upon the business of Maurice P. Koch individually.

Although the granting of a directed verdict may be error, if the jury verdict reaches the same result as the directed verdict, the parties can claim no prejudice.

Buckeye Powder Company v. E. I. DuPont De Nemours, et al., 248 U.S. 55 (1918);

Freeman v. Churchill, 30 C.2d 453, 183 P.2d 4 (1947);

Union Trust Co. v. Woodrow Mfg. Co., 63 F.2d 602 (8 Cir. 1933).

In *Buckeye Powder Company v. E. I. DuPont De Nemours, et al.*, 248 U.S. 55 (1918), the trial court directed a verdict in favor of certain defendants. The jury then returned a verdict in favor of the remaining defendants. The Supreme Court stated that since the liability of the defendant who was favored by the directed verdict was predicated upon the liability of the defendant who received the jury verdict, all defendants were exonerated by the jury verdict. The court held that in such a situation, an erroneous directed verdict does no harm.

The situation here is identical. Whether Maurice P. Koch was in the business of financing motion picture ventures depended upon whether the partnership of H. Koch and Sons was in the business of financing motion picture ventures. This result is necessitated by the appellants' position that Maurice P. Koch never acted on his own behalf, but on behalf of the partnership. Therefore, by its verdict concerning the partnership, the jury found that Maurice P. Koch was not in the business of financing motion pictures. If the court did not grant the directed verdict and deny recovery for the alleged \$15,000 individual loss, the jury verdict would have reached the same result. Therefore, any error in directing a verdict against Maurice P. Koch and Daisy Koch was not prejudicial.

3. THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT COULD DISREGARD ANY OF THE ACTIVITIES OF MAURICE P. KOCH AS PROOF THAT THE PARTNERSHIP WAS ENGAGED IN THE BUSINESS OF FINANCING MOTION PICTURES IF IT BELIEVED THAT IN A PARTICULAR TRANSACTION HE WAS ACTING ON HIS OWN BEHALF AND NOT ON BEHALF OF THE PARTNERSHIP.

The court instructed as follows:

“If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf and not on behalf of H. Koch and Sons, that transaction cannot be considered by you in determining whether the partnership of H. Koch and Sons was engaged in the business of financing motion pictures.”
(R. 302.)

The appellants do not contend that this instruction does not properly state the law. (Appellant's Opening Brief, pages 31, 34.) Their complaint is that the instruction does not give sufficient weight to the testimony of Maurice P. Koch.

Maurice P. Koch testified that on every occasion he was acting on behalf of the partnership. Appellants allege error in the instruction that the jury was not compelled to believe him. The only basis for holding this instruction error is for the court to say that a jury is compelled to believe the testimony of an interested witness.

The jurors were instructed that they were the exclusive judge of the credibility of the witnesses. (R. 302.) The court further instructed them in the manner in which this credibility was to be determined. (R. 303-304.) If the jurors are not permitted to de-

termine the credibility of Maurice P. Koch, then they are compelled to accept as true the uncontradicted testimony of every witness. Such is not the law. See *Allen v. Matson Navigation Company*, 9th Cir., April 7, 1958.

Although Maurice P. Koch stated that he always acted on behalf of the partnership, other inferences may be drawn from the facts. For example, of the \$25,000 loaned by Producers Finance Corporation to Ambassador Pictures Corporation for purchase of the book "Hill of the Hawk", \$17,000 was repaid personally to Maurice P. Koch. (R. 177.) On cross-examination Maurice P. Koch divulged that the funds loaned were personal funds, that the partnership was short of money, and that the loan was never reflected on the partnership books. (R. 161.) Certainly the inference was permissible that the transaction was a personal transaction, and the appellee was entitled to an instruction which would permit the jury to draw that inference. In addition, the appellee impeached Maurice P. Koch in relation to his attempts to collect \$80,000 from Beacon Pictures Corporation. (R. 156-158.) In view of this impeachment, the jury should be permitted to evaluate the testimony of Maurice P. Koch to determine whether he was telling the truth.

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4. THE COURT DID NOT ERR IN REFUSING TO GIVE THE INSTRUCTIONS PROPOSED BY APPELLANTS NUMBERED 13 AND 15.

The instruction which apparently was appellants' proposed instruction number 13 stated:

“That in determining whether or not H. Koch and Sons was engaged in the business of financing motion picture ventures, you must consider, among other things, the amount of time and effort expended in that direction and such time and effort, if any, must be considered by you whether or not an actual venture was concluded.” (R. 25-26.)

The instruction which is apparently referred to as appellants’ instruction number 15 was as follows:

“That in considering the question as to whether or not H. Koch and Sons devoted substantial time to the financing of motion picture ventures, you are required to consider all of their activities relating to that purpose, and all activities and efforts actually expended in attempting to negotiate for and in attempting to enter into financial transactions relative to the business of financing motion picture ventures must be considered by you upon this issue whether the same were concluded or not.” (R. 26.)

These instructions are confusing. The phrase “whether . . . an actual venture was concluded” is ambiguous and indefinite. There is no explanation in the instruction of how a venture is “concluded”. Therefore, the court could not give these instructions, since to do so would be error.

United States v. Jones, 33 U.S. 399 (1834);
Carpenter v. Connecticut General Life Ins. Co.,
 68 F.2d 69 (10th Cir. 1933).

But, assuming the instructions were not ambiguous, there was no error in refusing to include them in the

charge to the jury. Whether or not the activity constitutes a trade or business is a question of fact.

Maloney v. Spencer, 172 F.2d 638 (9th Cir. 1949).

To constitute a trade or business it must be shown that the activity was extensive, that it was regularly carried on, and that it constituted a major portion of the time, energy and effort of those who claim it as a trade or business.

Towers v. Commissioner, 247 F.2d 233, 235 (2nd Cir. 1957), cert. denied 355 U.S. 914 (1958);

Hickerson v. Commissioner, 229 F.2d 631 (2nd Cir. 1956);

Giblin v. Commissioner, 227 F.2d 692 (5th Cir. 1955);

Commissioner v. Stokes Estate, 200 F.2d 639 (3rd Cir. 1953).

The court instructed the jury:

“In determining that question you should consider all of the evidence which has been admitted in the case. The question of whether the debt is one the loss from the worthlessness of which is incurred in the taxpayer’s trade or business is a question of fact in each particular case. The statute does not give a definition for the word ‘business.’ Accordingly, in determining whether H. Koch & Sons was regularly engaged in the business of financing motion picture ventures you should consider the word ‘business’ to have its ordinary, common and accepted meaning. A taxpayer may engage in or regularly conduct one or several businesses at the same time. The amount

of time as well as the proportionate amount of capital devoted to a particular business are each factors among other factors to be considered in determining whether or not one is regularly engaged in a particular business.

“If a taxpayer regularly and continuously participates in business ventures in which he is not only financially interested but to which he devotes a substantial part of his time, such activities may make such ventures a trade or business of the taxpayer. Isolated or infrequent transactions of a taxpayer in any field do not constitute a trade or business within the meaning of the Internal Revenue Code.

“In determining whether an activity of a taxpayer is a trade or business you should consider among other things how extensive was the activity, the financial investment therein, whether it was regularly carried on, and whether the activity occupied a substantial portion of the time, energy and effort of the taxpayer.”

This was a proper statement of the applicable legal principles. The court advised the jury that the amount of time spent was a factor to be considered in determining whether the partnership was engaged in a trade or business. The jury was further advised that it was to consider whether the activity was regularly carried on and whether it occupied a substantial portion of the time, energy and effort of the partnership. Under this instruction, the jury was advised to consider all activities of the taxpayer, regardless of whether financing was accomplished.

And this was the nature of the evidence which the court permitted to go to the jury. Appellants, over

objection by the appellee, were permitted to introduce evidence relating to numerous phone calls, conversations, and documents relating to activities of the appellants in matters where no financing was ever accomplished.

Evidently the appellants complain that the court did not specifically instruct the jury that the appellants could be in the business of financing "whether or not an actual venture was concluded." (R. 26.) Although the court did not use the appellants' language, the import of its charge to the jury was that the jury should consider all activity of the taxpayers whether or not financing was concluded. Nothing further was required. "A judge is not bound to adopt the categorical language which counsel choose to put into his mouth. Nothing could be more misleading. If the case is fairly put to the jury, it is all that can reasonably be asked."

Ayers v. Watson, 137 U.S. 584, 601 (1902).

But even if this court determines that the instructions did not permit the jury to consider activities where financing was not actually accomplished, the appellants were not entitled to such an instruction. Where the business is that of lending money, the important issue is whether or not the taxpayer had actually loaned money.

Commissioner v. Smith, 203 F.2d 310 (2nd Cir. 1953), cert. denied 346 U.S. 816;

Pokress v. Commissioner, 234 F.2d 146 (5th Cir. 1956);

Friedman v. Delaney, 171 F.2d 269 (5th Cir. 1948).

Thus, whether loans were made was a factor to be considered in determining whether the taxpayers in the above cases were in the business of making loans. Here, therefore, whether any financing was actually done should be a factor to be considered in determining whether the appellants were engaged in the business of financing motion pictures. Accordingly, the appellants were not entitled to the instructions which advised the jury that whether or not actual financing was done was immaterial.

**5. ARGUMENT OF THE APPELLEE'S COUNSEL WAS
NOT PREJUDICIAL MISCONDUCT.**

Counsel for the appellee stated to the jury:

“You see, the plaintiff already had one crack at this case. He filed his claim for refund with the Commissioner of Internal Revenue and the Commissioner denied it.”

Upon objection by counsel for appellant, the court instructed the jury: “This is the first time the case has been tried and counsel was correct. A claim has been filed”. Counsel for the appellee then stated that the “matter had been presented to the Commissioner of Internal Revenue.” (R. 344.) Thus, the jury was not told that the case had been tried previously.

The jury was told that the defendant, through the Commissioner, believed this was a non-business bad debt. This was the fundamental issue in the action. The appellants claimed a business loss, and the appellee claimed it was a non-business bad debt. Appel-

lee's counsel merely informed the jury of the appellee's contentions.

In the complaint, appellants alleged: "The Commissioner of Internal Revenue, through the office of the Regional Commissioner of Internal Revenue, notified plaintiff on September 10, 1954 that said \$9,375 chargeable loss was a 1947 loss but that in his opinion the loss was a non-business bad debt and was therefore a capital loss and thus was deductible by petitioner in 1947 only in the amount of \$1,000." (Supp. R. 386.) The complaint was replete with similar statements. (Supp. R. 388, 390, 392-93, 394, 396, 398, 400, 402, 404, 406, 408-09, 411, and 413.) Appellee's counsels' remarks were merely stating what the appellants had alleged in the complaint. In *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698 (1888), plaintiff's counsel read parts of the complaint to the jury. The Supreme Court of California there stated: "And if in the progress of the argument, counsel desires . . . to further call the attention of jury to the facts alleged, there can so far as we can see, be no impropriety in doing so."

Knight v. Russ, 77 Cal. 410, 414, 19 Pac. 698, 700 (1888).

6. THE COURT DID NOT ERR IN ITS RULINGS ON ADMISSION OF EVIDENCE.

Plaintiffs offered an agreement between one Sam Coslow and the United Artists Corporation. (Exh. 5, Appellants' Opening Brief, Appendix D.) It con-

tained no reference to the appellants. (R. 213.) The only purpose of the agreement was to show the activity of other persons. Appellants' counsel stated: "It is part of the overall picture, to show the contribution of each person toward the entire pot that makes the independent picture." (R. 211-212.) The agreement did not relate to any activity of the appellants, and therefore, had no bearing upon whether the appellants were in the business of financing motion pictures. In any event, there was sufficient testimony of the existence of the agreement. (R. 45-46.) Thus, appellants' counsel were not prejudiced by the failure to admit the document.

Plaintiffs' offers of Exhibits 19, 24, 26, and 29 were refused by the court. These exhibits all related to activity of third persons and Ambassador Pictures Corporation. Ambassador Pictures Corporation was an independent entity, whose activities are not the activities of the appellants.

Dalton v. Bowers, 287 U.S. 404 (1932);

Burnett v. Clark, 287 U.S. 410 (1932);

Skarda v. Commissioner of Internal Revenue,
250 F.2d 429 (10th Cir. 1957).

The exhibits, therefore, are not relevant to show the activities of the appellants.

But, in any event, whether or not the documents are relevant, the appellants were not prejudiced by their exclusion. The documents were not offered for the truth of the statements contained in them, but were offered to prove the fact of the documents themselves—they were offered as proof of activity. With

the offer of each document, Maurice P. Koch testified that he had authorized or directed the preparation of the document as part of his activity. Although the document was not admitted in evidence, the very fact of the activity was in evidence by testimony of Maurice P. Koch.

**7. THE JURY VERDICT WAS NOT CONTRARY TO THE
WEIGHT OF THE EVIDENCE.**

The issue was whether the appellants were in a trade or business within the meaning of the Internal Revenue laws. The appellants alleged that they were in the business of financing motion picture ventures. Whether or not the activity constituted a trade or business was a question of fact.

Higgins v. Commissioner, 312 U.S. 212, 217 (1941).

Here, the appellants amended their partnership agreement to provide that they would be in the business of financing motion picture ventures. Appellants contend that the existence of the partnership agreement compelled the finding that they were in fact engaged in the business of financing motion pictures. However, it would seem that the existence, or non-existence of an agreement to engage in a business is merely a factor to be considered in determining whether the parties are actually engaged in the business.

In *Skarda v. Commissioner*, 250 F.2d 429 (10 Cir. 1957), the taxpayers were a partnership which engaged in various activities. One of the activities was the publication of newspapers. Subsequently, the

partners became the sole owners of a corporation which undertook the publishing business. However, there were no meetings of stockholders, no by-laws, no election of officers, no minute books, no corporate stock, and no property was formally transferred by the partnership to the corporation. Thereafter, the partnership made loans to the corporation which became worthless. The partnership claimed business deductions for these losses. The partnership contended that since it was the sole shareholder of the corporation, and that the corporation was merely organized to carry on business of the partnership and had not complied with the laws of the State relative to the formation of corporations, the losses were in fact business losses of the partnership.

The Court of Appeals for the Tenth Circuit denied this contention. It held that the losses had no relation to any business of the partnership. Thus, the fact that the partnership had agreed to engage in the publishing business was immaterial without further proof of actual publication.⁴

The appellants here demanded a trial by jury upon the issue of whether or not they were engaged in the business of financing motion picture ventures. The issue for the jury was whether evidence introduced by appellants showed sufficient activity to constitute a trade or business. The jury determined that it did not. This verdict should not be set aside.

⁴Although in the *Skarda* case, the court did not state that the partnership agreement was in writing, this would appear to be immaterial. Whether the agreement is in writing or oral is not relevant if the existence of the agreement is accepted.

8. THE EVIDENCE WARRANTED THE JURY VERDICT. THE COURT CORRECTLY MIGHT HAVE DIRECTED A VERDICT AGAINST THE APPELLANTS AND WAS GENEROUS TO THEM IN LEAVING THE QUESTION TO THE JURY. ACCORDINGLY, APPELLANTS HAVE NOT BEEN PREJUDICED BY THE JURY VERDICT.

(a) The means by which the partnership attempted to place itself in the business of financing motion pictures was through the activity of Maurice P. Koch. Although Maurice P. Koch was a partner in H. Koch and Sons, the partnership cannot adopt his activity to establish the business of financing motion pictures.

Maurice P. Koch was also an officer and director of Ambassador Pictures Corporation and Producers Finance Corporation. He testified extensively to negotiations for the purchase of "Hill of the Hawk" by Ambassador Pictures Corporation. However, financing the purchase of "Hill of the Hawk" for Ambassador Pictures Corporation was not done by Maurice P. Koch on behalf of the partnership, but was done by Maurice P. Koch on behalf of Producers Finance Corporation. (R. 167.) It was Producers Finance Corporation which loaned \$25,000.00 to Ambassador Pictures Corporation for purchase of "Hill of the Hawk", not Maurice P. Koch, or the partnership. (R. 176-177, Defendants' Exhibit "I".) In all the dealings by Maurice P. Koch in relation to the purchase of "Hill of the Hawk", he was not acting as a partner in H. Koch and Sons, but he was acting as the shareholder, officer and director of Ambassador Pictures, Inc. (R. 164-165.) Through his own testimony, it is evident that Maurice P. Koch was acting in his capacity as shareholder and director

of Ambassador Pictures Corporation and Producers Finance Corporation.

Further evidence that the loan to Ambassador Pictures Corporation was made by Producers Finance Corporation and not the partnership was the check to Ambassador Pictures. The maker of the check was Producers Finance Corporation. (Defendants' Exhibit I, R. 176-177.) The financing, therefore, could not have been by the partnership.

The corporation is regarded as an entity distinct from its shareholders, directors or officers. Relying upon this principle, the Supreme Court of the United States has held that the business of the corporation is not the business of the shareholder, officer or director.

Dalton v. Bowers, 287 U.S. 404 (1932);

Burnett v. Clarke, 287 U.S. 410 (1932).

See also:

Skarda v. Commissioner, 250 F.2d 429 (10th Cir. 1957);

Commissioner v. Smith, 203 F.2d 310 (2nd Cir. 1953), cert. denied 346 U.S. 816;

Commissioner v. Stokes Estate, 200 F.2d 637 (3rd Cir. 1953);

Van Dyke v. Commissioner, 63 F.2d 1020 (9th Cir. 1933), affirming 23 B.T.A. 946 (1931), affirmed 291 U.S. 642 (1933).

The major portion of Maurice P. Koch's activity was devoted to his activities as shareholder and director of Ambassador Pictures Corporation and Producers Finance Corporation. (R. 167.) This activity cannot be considered in determining whether H. Koch

and Sons was engaged in the business of financing motion pictures. If the activity is excluded, there was not sufficient evidence of activity by the partnership to sustain a finding that they were in the business of financing motion picture ventures.

(b) It is appellants' contention that although Maurice P. Koch may have been acting on behalf of Ambassador Pictures Corporation and Producers Finance Corporation, these corporations were the agents of the appellants. [See Appellants' Opening Brief 51-54 and proposed Instruction No. 9 (R. 24) which was given by the Court (R. 301).] To be considered an agent, the corporate business purpose must be carrying on the duties of an agent.

National Carbide Corporation v. Commissioner,
336 U.S. 422, 437 (1949).

Here, the corporations were not formed to act as agents, but were formed for the specific purpose of producing motion pictures (R. 82) and financing motion pictures (R. 95). The activities of these corporations cannot be ascribed to the partnership.

National Carbide Corporation v. Commissioner,
336 U.S. 422 (1949);

Moline Properties, Inc. v. Commissioner, 319
U.S. 436, 439 (1945).

If the activities of Ambassador Pictures Corporation and Producers Finance Corporation are excluded, there was not sufficient evidence of activity by the appellants to sustain a finding that they were in the business of financing motion picture ventures.

(c) The activity of financing motion picture ventures cannot be a trade or business within the meaning of the Internal Revenue laws.

The business of the corporation cannot be the business of the shareholders or directors. A taxpayer associated with many corporations cannot rely on the activities of the organization, but must establish his own activity apart from the organization's to prove a trade or business.

Dalton v. Bowers, 287 U.S. 404 (1932) ;

Burnett v. Clarke, 287 U.S. 410 (1932).

In *Commissioner v. Smith*, 203 F.2d 310 (2nd Cir. 1953), cert. denied, 346 U.S. 816 (1953), the Second Circuit refused to recognize investment management and other forms of financing as a trade or business.

This Court has taken a similar position. In *Ada v. Van Dyke*, 23 B.T.A. 1953, the taxpayer was engaged in development and promotion of town sites. The taxpayers financed the development of the town sites, utility companies and other forms of municipal improvements. The loss in question resulted from a loan to a corporation to promote the development of land sites and utilities. The Board of Tax Appeals held that the loss did not result from a trade or business. This Court affirmed, 63 F.2d 1020 (1933), citing *Burnett v. Clarke*, *supra*, and *Dalton v. Bowers*, *supra*. The judgment was affirmed by the Supreme Court of the United States, 291 U.S. 642 (1933). There, the investment and loans were made with the purpose of promoting, financing and organizing the utility companies and real estate improvement land.

See also:

Hickerson v. Commissioner, 229 F.2d 631 (2nd Cir. 1956);

Towers v. Commissioner, 247 F.2d 233, 235 (2nd Cir. 1957), cert. denied 355 U.S. 914 (1958).

The import of these decisions is that one who is instrumental in the formation of corporations and suffers a loss through a loan to one of the corporations, has not suffered a loss arising out of a trade or business. If these cases are to be followed, the activity of the appellants was not a trade or business.

CONCLUSION.

The judgment should be affirmed.

Dated, April 23, 1958.

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No. 15,645

United States Court of Appeals
For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

APPELLANTS' PETITION FOR A REHEARING.

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FILED

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PAUL P. O'BRIEN, CLERK

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**United States Court of Appeals
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HAROLD M. KOCH, BESSIE KOCH, WIL-
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Appellants,

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**On Appeal from the United States District Court
for the Northern District of California.**

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:*

Appellants, on the grounds following, petition for a rehearing of the Court's judgment affirming the judgment of the District Court for the Northern District of California.

I.

**THIS HONORABLE COURT HAS OVERLOOKED A WELL SETTLED
PRINCIPLE OF LAW SUPPORTED BY CONSISTENT AU-
THORITIES, AND ITS OPINION THREATENS EMBARRASS-
MENT AND CONFUSION IN THE AUTHORITIES.**

The rule regarding the effect of the presumption of correctness of determinations by the Commissioner of

Internal Revenue in the trial of tax causes has been well settled. The presumption disappears upon the introduction of evidence, and the issues are then tried, determined and depend *wholly upon the evidence produced*. The presumption cannot be considered when weighing the evidence. The presumption is *no longer existent* after the introduction of evidence, and *cannot affect the burden of proof*. When evidence has been introduced, the cause must be decided *upon the evidence alone*.

Appellants cited established authority, and particularly the decisions of this Court, in the cases as follows:

In the case of *Hemphill Schools v. Commissioner of Internal Revenue*, 137 F. 2d 961, C.C.A. 9 (1943), at pp. 963, 964, this Honorable Court reversed and remanded the cause for trial with the direction that the trial body: "(1) Find from the evidence, and from it alone . . ."

In that case this Court stated:

"Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct. *Evidence was produced*. Some of the evidence produced by the petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, *the presumption ceased, and thenceforth the issue depended 'wholly upon the evidence.'* It thus became the duty of the Board to find *from the evidence, and from it*

alone, whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the *presumption (which no longer existed)* as if it were evidence, weighed it against petitioner's evidence and concluded that petitioner's evidence did not 'overcome' it.

"Decision vacated and case remanded, with direction to (1) find from the evidence, *and from it alone*, whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business." (Emphasis ours, as well as this Court's in certain instances.)

Appellants also cited this Court's decision in the case of *San Joaquin Brick Co. v. Commissioner of Internal Revenue*, 130 F. 2d 220, C.C.A. 9 (1942), at p. 225:

"But once he presents competent and relevant evidence on every necessary element, the presumption of correctness of the Commissioner's determination *is no longer existent* and the outcome of the case depends upon the determination of the trial body after the consideration of the evidence brought before it by both sides." (Emphasis ours.)

Appellants also cited this Court's decision in the case of *J. M. Perry v. Commissioner*, 120 F. 2d 123 (1941) C.C.A. 9:

"This finding is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When

such *evidence* has been adduced the issues depend *wholly* upon the evidence so adduced and the evidence to be adduced by the Commissioner. *The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof.*" (Emphasis ours.)

In *Lawrence v. Commissioner of Internal Revenue* (1944) (9th C.C.A.), 143 F. 2d 456, this Court held that the presumption disappears when evidence is introduced sufficient to establish a *prima facie* case.

On September 12, 1958, this Honorable Court filed its opinion, in contravention of all prior decisions cited, and without reviewing or considering the same, the opinion states (on the last page) as follows:

"Appellants also object to an instruction on the ground that the presumption that the administrative determination that the partnership was not engaged in a trade or business was given *too much weight*. Appellants admit that there is such a presumption but *claim* it vanishes when evidence is produced."

Thus this Court has erroneously overruled all authorities upon the subject which clearly hold that the presumption disappears completely upon the introduction of evidence, and is no longer existent following the introduction of evidence. The authorities have determined that under no circumstances may the presumption be considered as evidence when actual proofs are made; that under no circumstances may the presumption preponderate over evidence adduced during trial. All previous authority on the subject has now been discarded by this Court with the statement that

appellants "claim" such a rule, and that the matter has a relationship to the *amount* of "weight."

By its failure to approve the respectable authority upon the subject, and its erroneous view of this cause, this Honorable Court has done away with the basic concept of the trial of all tax causes. We now have injected into the field of jurisprudence and fair trial, the concept that the one who is sued may, by his own self-serving declaration, establish evidentiary values which may preponderate over actual evidence adduced during trial. Thus a rule of "going forward" has been vicariously catapulted into the realm of evidentiary values which may preponderate over actual evidence adduced during trial. See *Redfield v. Eaton* (D.C.) (1931), 53 F. 2d 693, 696, which states:

"But that the Commissioner's decision, resting on evidence not presented to the Court—in this case the defendant offered not a single witness—has the quality of probative evidence in determining the preponderance of evidence, is a proposition supported neither by authority nor reason."

In the instant cause, just as in *Redfield v. Eaton*, supra, the defendant offered not a single witness, and in fact no evidence of probative value, and rested entirely on the presumption, which in turn was based upon nebulous considerations made outside of Court.

In giving such effect to the extrajudicial determination and self-serving declaration of the Commissioner of Internal Revenue, the trial Court, and now this Honorable Court have denied to appellants due process of law and a fair trial.

In the last paragraph of its decision, this Court repeats a portion of the instruction given as follows:

“The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner’s determination by proving by a preponderance of the evidence that they were engaged in a trade or business of financing motion pictures.”

This instruction clearly stated that the presumption affects the burden of proof; that a *prima facie* case is not a sufficient showing; that the presumption must be weighed with evidence opposing it; that the presumption continues during and throughout the determination and weighing of the cause and the evidence produced at trial.

The last sentence of the opinion is indeed shocking. Just prior to its appearance this Court reprints the portion of the instruction which states, in crystal-clear language, that the burden is upon plaintiffs to overcome the presumption by a preponderance of the evidence. The final sentence in the opinion nevertheless states:

“The instruction did not specifically state that the presumption was to be considered as evidence and the burden of proof of plaintiffs was correctly explained.”

We were surprised to find the quoted language in appellee’s brief, and we are now completely devastated to find it in the final words of this Honorable Court. Obviously, the instruction states that the burden is

upon the plaintiffs to overcome the presumption by evidence which preponderates over it.

This Honorable Court cannot now announce, without violence to concepts of law, that "the burden of proof of plaintiffs was correctly explained."

If this decision is permitted to remain without change, it would create chaos in the trial of tax causes, because:

(a) The clear rule enunciated by this Court on several occasions and the accepted and prevailing rule is now shrouded and overruled.

(b) Should trial Courts instruct the jury as to the "weight" to be given to the presumption, despite the previously prevailing rules that the presumption "disappears"; that it cannot "affect the burden of proof"; that "the presumption ceased"; that the issue depends *wholly* upon the evidence"; that the duty is to find "from the evidence, and from it alone"; that after the introduction of evidence the presumption "no longer existed"; that it is error to have "weighed it against petitioners' evidence"?

The Government did not call a witness, and its defense was based entirely upon the alleged presumption. Meticulous examination of the record reveals absolutely no testimony or evidence upon which a defense could be predicated in the absence of such alleged presumption.

The trial Court made its findings of fact and drew its conclusions of law based upon the erroneous concept that the presumption persisted, and ruled

throughout the trial, during argument, in its instructions, in its conclusions of law, and in its judgment, that the *presumption* persisted. The entire determination was based upon this erroneous view.

The presumption was the central issue in the case. The trial and determination of the cause was controlled by this erroneous concept.

This Court must recognize the violent effect of the last words of its decision, which states that "the burden of proof of plaintiffs was correctly explained."

It is not for the Appellate Court to determine the weight of the evidence. If we deduct from the scales the effect of the *presumption*, it is probable that the trier of facts would determine that the evidence favoring the taxpayer's position outweighs or is more convincing than the evidence opposed to it (there being none). The devastating effect of the erroneous use of the presumption when fortified by the Government's final emotional appeal "we submit to you, ladies and gentlemen, the finding of the Commissioner of Internal Revenue, who was a duly and legally appointed executive officer of the Government, sworn to administer Internal Revenue Laws . . ."; (R. 371) and the further argument (over objection) that "plaintiffs have already had one crack at the case" (R. 344), cannot be ignored by this Honorable Court. This error pervaded each and every determination in the trial Court, and set up a false barrier of such magnitude that the same could not be overcome.

**THE PARTNERSHIP AGREEMENT WAS ERRONEOUSLY
CONSTRUED BY THIS COURT.**

The partnership agreement, construed within its four corners (appellants' opening brief appendix B), provides "The said partnership business will, . . . engage in the business of financing motion picture productions". The basic agreement (appellants' opening brief appendix A) provides . . . "all of said parties shall devote all of their time to the interest of said business and for the benefit thereof . . ." and further provides for forfeiture of the partnership interest if this provision is breached.

Although the partners could contribute disproportionate amounts, all such contributions are covered by the partnership agreement; the same are subject to disbursement under the partnership agreement; the same became assets of the partnership; the same are in each and every respect controlled by the partnership and by the partnership agreement; and each and every act of the partners in this connection is on behalf of the partnership.

This Honorable Court has misconstrued the partnership agreement and has stated "the partnership agreement seems to contemplate loans and other activities of the individual partners". This is diametrically opposed to a proper construction of the partnership agreement.

**THE OPINION OF THIS HONORABLE COURT IS REplete WITH
MISTAKES REGARDING THE FACTS OF RECORD.**

Most glaring is the constant repetition in the decision that the appellants were engaged in the business

of loaning money; whereas the record demonstrates that the activities were designed to promote and finance the pre-production "phases" (or the so-called "packaging") of film productions. Appellants desired to obtain as large a participation and ownership in each film venture as possible and advanced funds only to the extent necessary to obtain such interests. Their activities were limited to so-called "front money" (R. 226, 227) for the purpose of forming the corporation and acquiring the rights to literary properties, artistic talents and facilities (R. 40, 42, 196, 226, 227, 229, 230). They did not finance production during principal photography of films. Their efforts were devoted to assembling the corporate vehicle, stories, artistic talent, facilities and other funds necessary to production. The decision erroneously recites and repeats that they were trying to make loans.

Their continuous expenditures of valuable time, money and effort is now erroneously described in the opinion as follows: "The record is replete with activities of Maurice P. Koch consisting of telephone calls, conversations, discussions and airplane journeys"; and the opinion also states: "... we do not think the jury could conclude that a number of futile transactions and activities looking toward consummation of loans had *any value* in determining whether the partnership was engaged in the business of financing." (Emphasis ours.)

We are constrained to observe that this Court has knowledge of the difficulties inherent in "packaging" artistic talents, facilities and the enormous sums re-

quired for production of films, and the inherent requirements of time, energy and funds to the purpose of bringing about a merger, at the same time, of all the necessary ingredients to the production of a major motion picture in the so-called "independent" field.

Also in error is the statement: "Sebastian and Hersch repaid the \$10,000 loaned upon the sale of the first picture". This \$10,000 was not loaned; it was not repaid; and it was lost. This error in the concept of facts indicates complete misunderstanding by this Court of the facts of this case. The sum of \$15,000 was delivered by appellants to David Sebastian. \$5,000 of this sum was used by Sebastian on behalf of appellants for the expenses of organizing the affairs of Beacon Pictures. \$10,000 of this sum was used to buy the stock of Beacon Pictures in the name of one Coslow, which stock had to be in Coslow's name in order to obtain distribution through United Artists (Plaintiffs' No. 5 for identification, appendix D, appellants' opening brief) (R. 50-53, 250-252). Said Exhibit 5 was erroneously excluded by the trial Court. The opinion should correctly recite that appellants caused Beacon Pictures to be organized, and caused its properties, talents and facilities to be assembled, and that appellants expended sums for that purpose in addition to their efforts.

Despite the fact that the partnership put up the money and did everything to get this project started, the opinion recites erroneously "... but the partnership did not engage in the organization of such corporation" (Beacon).

Obviously, the \$10,000 in capital stock issued to Sam Coslow did not establish capital of any meaning when considered in the light of obligations totaling \$1,400,000.00 incurred in the production of the film. The opinion should clarify that the amounts advanced as so-called "loans", were in reality funds which could only be realized, if at all, from the success of the venture or syndicate.

This Court has also overlooked the fact that appellants were engaged in the business of "packaging" film productions for more than three years prior to the year in question, and continued to engage in the same for some years following the year in question. The opinion overlooks the salient fact that all of plaintiffs' available funds became frozen in the year 1947 in the unfortunate film called *Copacabana*, and that the freezing and loss of these funds prevented the conclusion of the many pending negotiations. The opinion is also erroneous in concluding that Maurice Koch advanced funds to Apex Films, when in fact the funds were advanced by the partnership as well as by and through Producers Finance Corporation which was organized solely by the partnership for that purpose (R. 173-4).

This Court likewise erroneously concluded that a directed verdict was granted as against Maurice Koch when, in fact, the Court merely eliminated his claim based upon the loss of \$15,000 more than the amounts lost by the other partners, which ruling is contrary to the issues framed by the pleadings which admit the loss of the entire sum of \$90,000, including

the additional \$15,000 loss sustained by Maurice Koch. Just how the trial Court arrived at a finding that only \$75,000 was lost despite the plain facts, the issues as framed by the pleadings, and the realities of the situation will continue to remain a mystery which we fervently hoped would be resolved by this Court. The trial Court refused to hear from appellants upon the subject.

THE RULE ANNOUNCED BY THIS HONORABLE COURT REGARDING CONSIDERATIONS TO BE GIVEN TO ACTIVITIES OF THE TAXPAYER IN DETERMINING WHETHER OR NOT ONE IS ENGAGED IN A PARTICULAR BUSINESS IS IN CONFLICT WITH THE PREVAILING LAW PROMULGATED AND APPROVED BY THE SUPREME COURT AND ALL OF THE CIRCUITS.

Note: We have mentioned that appellants were not in the business of making "loans", and that this Honorable Court is in error in stating that appellants made only one isolated "loan at the outside," when in fact appellants were constantly engaged during the entire year 1947 in "packaging" films and expended time, energy and funds consistently during said year for that purpose. We also note that this procedure continued prior to, as well as following the year in question.

In view of the peculiar facts of the case and the arguments and contentions made at the time of trial, appellants requested several instructions to the effect that time and effort expended for the purpose of advancing appellant's projects should be considered by

the triers of fact, and should be considered whether or not the same resulted in completed productions.

An appeal was taken to this Court upon the failure of the trial Court to instruct upon the subject as requested (see App. Op. Br. pp. 10 and 11; R. 23 to 26) and for the purpose of having the rule clearly enunciated that all activities of the taxpayer, including all time, all efforts and all funds expended in advancing the taxpayers' projects should be considered in determining whether or not the taxpayer is engaged in a particular trade or business.

This Court has announced its views upon that subject; however, these views are in conflict with prevailing authority. Prevailing authority upon the subject (see footnote 5, p. 40, appellants' opening brief) has established that all activities must be reviewed and considered. The decision of this Court on p. 5 states:

"Where appellant had made only one isolated loan at the outside, we do not think the jury could conclude that a number of futile transactions and activities looking toward consummation of loans had any value in determining whether the partnership was engaged in the business of financing."

Thus this Court has held that activities which do not result in concluded transactions have no value in determining whether a taxpayer is engaged in a particular business.

The decision of this Honorable Court holds that only activities relating to completed transactions may be considered in this vital determination.

We find no authority for the proposition that only concluded transactions, or that only fully produced film productions, or that only efforts expended upon concluded transactions may be considered in determining whether or not one is engaged in a business. No consideration is afforded the taxpayer who has devoted his time, effort, energy and substance when only one, or a very few, transactions are successfully culminated.

We note that that there are many large enterprises such as the independent film business, where numerous efforts result in but very few concluded transactions. Certainly, only concluded transactions are not fully probative of the time, effort, energy and substance expended.

WHEN PERSONS FORMALLY AGREE TO ENGAGE IN A PARTICULAR BUSINESS AND ACCORDINGLY PROCEED TO ACT UNDER THE AGREEMENT, FURTHER INQUIRY IS IMPROPER.

We note that here the taxpayers solemnly agreed by formal agreement to engage in the business of financing motion picture ventures some three years prior to the period in question; that they acted thereunder prior to the time in question, during the time in question, and after the time in question. There was no suggestion of fraud, and the Court actually found that their agreement was at all times in full force and effect.

In the absence of specific agreements the Courts have resorted to a consideration of the activity of the

persons involved in order to determine the amount of time, efforts, energy and funds expended for the purpose of establishing the fact in question by overt acts. When parties have stipulated their intentions in formal writing and have agreed and acted accordingly, it would appear erroneous to permit inquiry having far less probative value and not necessarily related to the particular act or transaction in question. Thus, if persons agreed formally to engage in the building business and actually built a building, why should Courts look further to establish the clear intent and purpose of the parties? We suggest that any rule which contravenes the formally expressed purpose, intent and act of the parties and permits inquiry into secondary evidence and *res inter alios acta*, should not be acceptable to this Honorable Court.

THIS COURT HAS ERRONEOUSLY HELD THAT THE BUSINESS OF FINANCING IS NOT A TRADE OR BUSINESS.

Cases have been decided upon the peculiar facts of each case; however, there is no authority for the rule now announced by this Court that the business of financing, under a "common sense view", is not a trade or business.

This Court has stated:

"It may be that the jury took a common sense view and refused to recognize investment, management and other forms of financing as a trade or business."

The view, thus expressed, is inherently incorrect in fact as well as in law. It seems well settled that any

activity may be or become a business if conducted as a business. Financing is certainly no exception and has been a well-recognized basic business since the beginning of known civilization.

The pronouncement by this Court of a rule that financing, under a "common sense view", may not be regarded as a trade or business will create unexpected confusion in the law.

ERRONEOUS RULINGS RE REJECTION OF EVIDENCE HAVE NOT BEEN CONSIDERED BY THIS HONORABLE COURT, AND RULINGS CONSIDERED HAVE BEEN DETERMINED IN ERROR, BOTH IN LAW AND IN FACT.

The most cogent inquiry involved the amount of time spent in connection with motion picture activities. The trial Court excluded testimony offered to prove the amount of time spent during the year in question (R. 2, R. 60; R. 245-246).

Numerous documents were presented and refused upon the ground that the same were not executed. Those that were executed, and due execution proved, were excluded on the ground that the name of appellants did not appear therein (R. 46, 210-212, 213-214, 78-85, 84-85, 99-100, 78, 88-89, 109, 124, 128-130, 92-93).

The opinion of this Court states:

"... the documents did not prove anything with regard to appellants. They were properly excluded."

These documents tended to prove the time, efforts, energies and funds expended in negotiation and in

packaging motion picture financing transactions. They are the various documents which tangibly demonstrate the various packaging efforts for each of the artistic elements, facilities, distribution of films, and financing. These are the ingredients which must be obtained, all at the same time, in order to make a film, and the record clearly demonstrated that it would be senseless to execute one agreement, for only one of the elements, unless all were available at the same time. The problem is inherent in the nature of independent film production.

The documents were not offered to prove the truth of their content. They were offered to show the time and effort expended, and further to show the intention of the partnership as indicated by the overt acts of negotiation which resulted in the documentation. The Court and jury could have reasonably drawn from these documents inferences supporting plaintiffs' position that time and negotiations continued and that funds were expended in such negotiations as well as in the drafting of the documents.

It was clear that the documents were offered for the purpose of proving activity, and not to prove that particular transactions were concluded. Of course, if the rule now announced by this Court in its present opinion should stand, efforts, negotiations, expenditures of time and all of their substance expended by these partners become meaningless; however, we fervently hope that this Honorable Court will reappraise its opinion in this regard.

CONCLUSION.

We respectfully submit:

(1) that all causes, including the instant one, should be tried upon the basis of appropriate legal criteria;

(2) that the opinion filed by this Court will create confusion with regard to generally accepted principles prevailing in tax trials; and

(3) that the matter must be reconsidered and the opinion and decision of this Court revised.

We respectfully request that in the event appellants' petition for rehearing is denied, this Honorable Court permit hearing of this cause en banc in order that appropriate criteria respecting the trial of tax causes may be fully considered by this Court, and in order that appropriate instructions and rules of evidence may be applied for the benefit of litigants in such causes.

Dated, San Francisco, California,

October 10, 1958.

Respectfully submitted,

MAX FINK,

LEON SCHILLER,

*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

Counsel in this cause certify that in their judgment the grounds stated in this petition for rehearing are well founded, and this petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
October 10, 1958.

MAX FINK,

LEON SCHILLER,

*Attorneys for Appellants
and Petitioners.*

No. 15,645

United States Court of Appeals
For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WILLIAM L. KOCH, ROSE KOCH, REBECCA KOCH ABEL, MAURICE P. KOCH, and DAISY KOCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

APPELLANTS' REPLY BRIEF.

MAX FINK,

LEON SCHILLER,

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No. 15,645

United States Court of Appeals For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH, and
DAISY KOCH,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

APPELLANTS' REPLY BRIEF.

ARGUMENT.

I.

THE ERRONEOUS INTERPRETATION OF THE TERM "ENGAGE
IN THE BUSINESS OF FINANCING MOTION PICTURE PRO-
DUCTIONS".

The errors during trial, now emphasized by Ap-
pellee's Brief, resulted from an erroneous interpreta-
tion of the phrase taken from the partnership agree-
ment (Appellants' Brief, Appendix B), i.e., "... en-
gage in the business of financing motion picture pro-
ductions . . ." The term "finance" and the corre-
sponding term "financier" must be defined as the con-

duct of financial affairs and negotiations respecting the same. Definition must include negotiation for participating interests, profits, and other considerations which prompt and promote all business activity.

At the time of trial, as well as in its brief, appellee asserted that engaging in the business of financing motion picture ventures means only the making of loans, and that only consummated loans are relevant for consideration in determining whether or not the loss in question resulted from an isolated transaction, as distinguished from the conduct of business. Unfortunately, appellee was substantially supported in its views by the trial Court.

In every motion picture venture appellants negotiated for substantial participation by way of ownership, and assignments of income and profits. Each transaction contemplated profit and ownership participations, as distinguished from simple interest for the funds advanced. Thus, appellants became the assignee and largest owner of the profits and benefits of the picture "Copacabana" from which the \$90,000.00 loss resulted. We do not deem it necessary that the respective transactions receive definite labels or precise legal definitions. See *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P. 2d 931; *Hyman v. Hyman*, 98 C.A. 2d 463, 220 P. 2d 623. It is sufficient to note that in each instance it was contemplated that the partnership would contribute cash, whereas others contributed artistic talents, services, etc.

It is true that in some instances the partners created corporations which the partnership owned, con-

trolled and operated for the purpose of advancing its film activities. All corporate expenses were paid by the partnership, and the partners acted in respect to the corporation only to promote the partnership business.

See *Giblin v. Commissioner* (1955), 227 F. 2d 692 (C.C.A. 5), which held that the taxpayer was entitled to a business bad debt deduction in connection with a loan to a company he had promoted, stating:

“Petitioner’s right to deduct the amount of the cancelled debt depends not upon his showing, as the Tax Court seemed to think, that he was in the business of lending money, but rather that he was regularly engaged in the business of ‘dealing in enterprises,’ during the course of which he operated either as a proprietor, as a stockholder, as a partner or as a lender or in a combination of these capacities, contributing to each enterprise his own initiative and energy, and such financial backing as it required.”

In that case the Court also held as time and effort spent on taxpayer’s business, the time he spent on the affairs of the corporation he formed, as this activity was part of his individual business.

Appellee argued to the jury and now in its brief that acts in connection with the corporations formed by the partnership cannot be regarded as activities of the partnership. Although we do not suggest that every act of a corporation thus formed is the act of the partnership, we urge that every act of a partner of H. Koch & Sons in furthering the business of these corporations was a business act of the partnership. The

partnership activated corporations in order to have a vehicle to finance and through which the partnership's funds could be utilized for such financing.

In *Commissioner of Internal Revenue v. Stokes' Estate*, (1953), 200 F. 2d 637 (C.C.A. 3), the Court held that the taxpayer was engaged individually in the business of exploiting patents even though the activities were conducted through corporations activated by him. The Court specifically considered *Dalton v. Bowers* (1932), 287 U.S. 404; *Burnet v. Clark* (1932), 287 U.S. 410; *Higgins v. Commissioner* (1941), 312 U.S. 212, and other cases cited by appellee and distinguished the same. The Court held:

“That the evidence established that his activities in locating, developing and exploiting patents involved much more than the mere investment of funds in and management of corporations.”

Foss v. Commissioner (1935), 75 F. 2d 326 (C.C. A. 1) and *Kales v. Commissioner* (1939), 101 F. 2d 35 (C.C.A. 6), which hold to the same effect, are cited with approval by this Honorable Court in *Maloney v. Spencer* (1949), 172 F. 2d 638 (C.C.A. 9); and this Honorable Court in that case distinguished substantially the authorities cited by appellee and held that the taxpayer was engaged “in the business of acquiring, owning, expanding, equipping and leasing food processing plants”.

II.

THE PARTNERSHIP AGREEMENT WAS MISINTERPRETED AND THE ENTIRE PRESENTATION AND CONSIDERATION OF THE CAUSE WAS PREJUDICED THEREBY.

The cause was essentially tried and determined by the trial Court. The trial Court made its findings of fact, and conclusions of law, and granted judgment. The parties could only agree upon one interrogatory to be propounded to the jury and therefore, by stipulation, all other matters were left for determination by the trial Court (R. 293).

The interrogatory was: "During the year 1947, was H. Koch & Sons regularly engaged in the financing of motion picture ventures?" The answer to this interrogatory required (a) proper interpretation of the partnership agreement; and (b) determination as to whether or not the transaction from which the loss resulted was an isolated transaction as distinguished from a course of business. In this latter respect it became essential to consider each and all of the activities of the partnership to establish the time and effort expended and continuity of activity.

(a) The trial Court misinterpreted the partnership agreement (Appellants' Brief, Appendix B, page x) and thereby prevented fair and appropriate consideration of the facts.

The agreement provided:

"... engage in the business of financing motion picture productions . . . if any individual partner or partners desires to advance any sums toward the above mentioned business activity over

and above the sum advanced by this partnership that the profits realized on such sums advanced by the individual partners or the partnership shall be divided as follows: . . . The profit on such sum or sums advanced by any one or more partners over and above that advanced by the other partner or partners shall belong to the individual partner or partners so advancing any excess; . . . The losses on any sums advanced by individual partners over and above that advanced by the other partner or partners equally shall be borne wholly by said partner or partners so advancing such excess. . . . Maurice P. Koch is hereby appointed General Manager of that portion of the partnership business . . . and any expenses . . . shall be borne by the said partnership . . . as such General Manager the said Maurice P. Koch is hereby authorized to deal in his own name. . . .”

The pleadings admit that the partners advanced a total of \$90,000.00 and that complete loss resulted. The entire sum was drawn from partnership funds; however, after the advancements were made, the partnership was short of cash and Maurice P. Koch borrowed and advanced to the partnership \$15,000.00 to replace some of the funds advanced (R. 287). Therefore, under the partnership agreement Maurice P. Koch suffered the loss of \$15,000.00 more than his co-partners. The trial Court refused to understand that even though additional funds were advanced by one of the partners, such advances were nevertheless partnership activities and are governed by the part-

nership agreement. By reason of this misinterpretation the trial Court ruled that in order to establish the additional \$15,000.00 loss, Maurice Koch had to be individually engaged in the business (as distinguished from the partnership). Admittedly all of his acts were on behalf of the partnership and he was not at any time individually engaged in motion picture ventures. Therefore, without hearing argument, and contrary to the admissions of the pleadings, the Court granted dismissal (or directed verdict) against Maurice P. Koch (and his wife) with regard to the added \$15,000.00 loss (R. 292) and the Court made its finding (Finding No. 6, R. 8) that only \$75,000.00 was lost, in the face of pleadings which admit that \$90,000.00 was lost.

(b) Perhaps more devastating was the Court's instruction to the jury to disregard all the activities of Maurice P. Koch in his own behalf. Pursuant to the partnership agreement he managed and conducted all of the partnership affairs in connection with films and all documentation was in his name. Each and all of his activities were for the partnership and only for the partnership (R. 43, 44, 45, 56, 57, 72, 76, 96, 97, 101, 112, 122-125). By ruling that Maurice Koch could not assert the \$15,000.00 loss because he was not individually engaged in the business, the trial Court ruled as a matter of law that he had absolutely no activities in motion picture ventures on his own behalf. Nevertheless the Court instructed the jury that it could not consider Maurice Koch's activities on his own behalf in determining whether or not the partner-

ship was engaged in the business (R. 302). Exception was taken (R. 311-312). There is absolutely no theory of fact in the entire case on which such an instruction could have been predicated. The suggestion thus made that he was engaged on his own behalf was prejudicial. By the terms of the formal partnership agreement Maurice Koch was the Manager of the partnership; managed and conducted all of the picture activities; and was authorized to act in his own name. Under the instruction the jury was prone to disregard all documentation bearing his name, and all activities conducted by him, despite the fact that the same were partnership activities and paid for by the partnership in every respect. This prejudicial error was then compounded by the Government argument to the effect that his activities must be disregarded (R. 349, 352-354). Having captured a directed verdict or dismissal on the Court's own motion, the Government then proceeded to advise the jury that Maurice Koch's activities were in his own behalf and not for the partnership and that his activities should not be considered. Since he conducted all of the activities of the partnership, the prejudice is evident.

Regardless of what action the jury may have taken, the Court's findings on the subject are in error. The pleadings admit the loss of \$90,000.00, not \$75,000.00 as found by the Court (Finding 6; R. 8). The Court failed to make a finding that all of Maurice Koch's activities were on behalf of the partnership, though the Court ruled, as a matter of law, that all of his activities were on behalf of the partnership. On the other

hand, the Court made a finding that Maurice Koch was not individually engaged in the business despite the fact that there was no issue thereon (Finding 10; R. 10). These findings merely emphasize the Court's erroneous interpretation of the partnership contract and the issues in the cause. The entire cause was tried and determined upon these false premises.

III.

CORRECTION OF FACTS.

Space does not permit complete correction of appellee's statements of facts; however, we note particularly the following:

(1) Appellee's statement regarding the \$15,000.00 advanced to David Sebastian is incorrect. This sum was advanced to organize and activate Beacon Pictures Corporation for the production of the picture "Copacabana". The check for this amount was received in evidence as Exhibit 6 (R. 47). The check was drawn by the partnership on partnership funds and had no particular connection whatsoever with the \$15,000.00 additional loss suffered by Maurice Koch by reason of an equal sum contributed by him to the partnership some seven months later. The stock of the corporation had to be held (pursuant to Exhibit 5 for identification) (Appellants' Brief, Appendix D, page xvi) in the name of Koslow, although by said agreement, which the Court erroneously rejected, the corporation could then assign proceeds and profits received from the picture to others. The pleadings

admitted the loss of all funds alleged to have been lost and there is no issue regarding same. In any event, it was clear that these funds would only be repaid in the event the picture was successful and proceeds were received (R. 250-252). Admittedly the sums were lost; there is no issue thereon; and the argument has no bearing on this case.

(2) Ambassador Productions, Inc. was also formed in order to "package a deal" to finance. The shares were issued in the name of Maurice P. Koch pursuant to the partnership agreement which authorized all transactions to be conducted in his name. The mere existence of the corporation does not negative the partnership activities in regard to the corporation as well as by means of the corporation.

(3) Producers Finance Corporation was also formed and conducted by the partnership, at partnership expense. The purpose was likewise to create a situation which required financing and to also provide a means for raising funds from others.

(4) Admittedly Maurice P. Koch and the various attorneys for the partnership were officers and directors of the various corporations which were formed and activated; however, this was done to promote partnership purposes. The argument by appellee to the jury and in its brief that when Mr. Koch or the attorneys become directors or officers of the corporation, their acts are no longer acts of the partnership is untenable.

(5) Appellee's Statement of The Case lists only a few activities and omits the fact that during the exact

time in question appellants conducted many other film financing matters as disclosed by the record (R. 62, 63, 67, 68, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 104, 106, 107, 108, 110, 111, 112, 113, 114, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 134, 159, 161, 165, 166, 173, 174, 176, 183, 184, 191, 192, 193, 194, 198, 199, 201, 202, 208, 209, 210, 213, 214, 215, 216, 218, 220, 221, 231, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247).

IV.

RE THE PRESUMPTION OF CORRECTNESS OF DETERMINATIONS BY THE COMMISSIONER OF INTERNAL REVENUE.

(a) The Government had no witnesses and, in fact, offered no testimony which could in any manner affect the determination of the cause. The Government's defense was based entirely upon the alleged presumption of correctness of the determination by the Commissioner of Internal Revenue. Meticulous examination of the record reveals absolutely no materials, testimony or evidence upon which a defense could be predicated in the absence of such alleged presumption.

(b) The effect of the presumption was discussed with the trial Court and the Court made its position quite clear upon the subject during the trial and before arguments and instructions.

(c) This was, in fact, a trial by the Court and not by the jury whose function was limited to a single interrogatory. The erroneous ruling with regard to

this presumption of correctness of the Commissioner's determination was the basis for the trial Court's findings of fact, as well as conclusions of law.

(d) The Court ruled clearly during the trial, during argument, during instructions, in its findings of fact, in its conclusions of law, and in its judgment that there was a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion pictures was correct; and that the burden was upon plaintiff to overcome the presumption of the correctness of the Commissioner's determination by *a preponderance of the evidence* (R. 9, 301, 344). Unfortunately, considerations of the subject off the record do not appear.

(e) For the reason that it constituted the only defense of the Government, the matter of the presumption and overcoming the same became the *central issue in the case*.

(f) Contrary to the rule repeatedly announced by this Honorable Court holding that after evidence is introduced "the Commissioner's determination is no longer existent" . . . "The issue depended wholly upon the evidence" . . . "Find from the evidence and from it alone" . . .¹, the trial Court consistently enforced its

¹The words are excerpts from the Ninth Circuit cases as follows:

San Joaquin Brick Co. v. Commissioner of Internal Revenue (1942), 130 F. 2d 220, 225;

Hemphill Schools v. Commissioner of Internal Revenue (1943), 137 F. 2d 961, 964;

Lawrence v. Commissioner of Internal Revenue (1944), 143 F. 2d 456.

erroneous rule that the presumption survived all evidence in the case. Thus the presentation of the cause was necessarily required to conform to the law of the case as determined by the trial Court and as counsel knew the Court would instruct the jury, and upon which the parties knew the Court would premise its findings and conclusions. Under this erroneous concept, a *prima facie* case could not survive because it was here necessary to overcome the presumption by a preponderance of evidence.

(g) As stated in *Harlem Taxicab Association v. Nemesh* (1951), 191 F. 2d 459, 461, where the Court considered erroneous instructions regarding the effect of a presumption and to which no exception had been taken:

“But the court had repeatedly stated its view of the law in the course of the trial and had repeatedly prevented appellant’s counsel from proceeding on the opposite view. ‘The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and if necessary correct them.’ It would have been only a formality to ask the court at the end of the trial to reverse itself. An error in instructing a jury may be raised by an appellate court, when justice seems to require, even though it cannot be raised by the appellant.”

After the cause had been tried on the erroneous theory of law, and after the trial Court had specifically considered the proposition of law, and after argument by counsel framed in accordance with the trial Court’s

view of the law, and after the erroneous instructions by the Court in accordance with the erroneous rulings,—the formality of requesting the Court to make corrections in its instructions to the jury would have been nugatory and a sham. Only a new and different trial could obviate the error.

(h) In *Hormel v. Helvering* (1941), 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037, the Supreme Court stated:

“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.”

(i) See appellee’s argument to the jury re “plaintiffs already had one crack at this case” (R. 344 and the Government’s final emotional appeal to the jury: “we submit to you, ladies and gentlemen, the finding of the Commissioner of Internal Revenue, who was duly and legally appointed executive officer of the Government, sworn to administer internal revenue laws, . . .” (R. 370-371)).

We submit, without painstaking or apology, that the Government’s entire argument to the jury was shocking in the extreme. The same did not adhere to the known law of the case; was based upon misstatement

of law and fact, and the officer of the people and whom the jury therefore received as their own adviser, effectively and passionately injected mistrust, contrivance, unwarranted personal attacks, and in finality rested upon the “duly and legally appointed and executive officer of the Government sworn to administer revenue laws . . .”, to wit: the determination of the Commissioner of Internal Revenue, as the basis for the jury’s finding.

(j) Even though Fed. R. Civ. P. 51 may apply to the special type of trial had in this cause, this Honorable Court nevertheless has the inherent power to note “plain error” related to the central issue in the cause in order to prevent manifest injustice.

We note that all of the Circuits (with the possible exception of the Ninth Circuit), to the extent that the question has arisen, have held that Appellate Courts may apply the doctrine of “plain error”. See *Giacalone v. Raytheon Manufacturing Co.* (1955), 222 F. 2d 249 (C.C.A. 1), where the Court stated:

“It does not follow from this, however, that under no circumstances can we consider the error on our own volition.”

The Second Circuit recognizes the rule in the following cases:

Moore v. Waring (1952), 200 F. 2d 491;

Finn v. Wood (1950), 178 F. 2d 583.

The Fourth Circuit considers the matter in *Hite v. Western Maryland Railway* (1954), 217 F. 2d 781, 782:

“If there had been error in the instruction to the jury which in our opinion had led to a miscarriage of justice, we might notice it under our power to notice plain error not assigned to prevent injustice, but there was no such error.”

The Fifth Circuit stated in *Louisiana & Arkansas Railway Company v. Moore* (1956), 229 F. 2d 1:

“However, since it goes to the central issue in the case . . . we may consider it under the general rule which allows an appellate court to notice plain errors, although they were not properly excepted to below.”

To the same effect, see *United States v. Chemell* (1957), 243 F. 2d 944 (C.C.A. 5).

The Eighth Circuit recognizes the rule in *O'Malley v. Cover* (1955), 221 F. 2d 156.

The Tenth Circuit also recognizes the rule in *Allen v. Nelson Dodd Produce Co.* (1953), 207 F. 2d 296, 297.

The Court of Appeals for the District of Columbia enunciated the rule in *Harlem Taxicab Association v. Nemesh, supra*. This Court has enacted its own rule for that District, enunciating that that Court will notice and pass upon “plain error”, and has exercised this power in situations where there is failure to comply with said Rule 51. By adopting its own rule relating to “plain error”, that Court has held that Rule 51 does not eliminate the inherent power of the Court to pass upon matters of “plain error” to prevent injustice. See also *Montgomery v. Virginia Stage Lines* (1951), 191 F. 2d 770 (C.C.A.D.C.).

For comparison, see also *Hormel v. Helvering, supra*.

This Honorable Court gave consideration to the matter of "plain error" in *Walker v. West Coast Fast Freight, Inc.* (1956), 233 F. 2d 939 (C.C.A. 9), and in *Flinkkote Company v. Lysfjord* (1957), 246 F. 2d 368 (C.C.A. 9).

Since rules of procedure should not require sacrifice of the rules of fundamental justice, we fervently trust that this Honorable Court will announce the rule of "plain error" in accordance with the holding of all other Courts which have passed upon the matter. However, in this cause the trial Court made its own findings and conclusions based upon the view that the presumption persisted and had more probative value than the evidence offered, and the trial Court granted the judgment. The trial Court likewise permitted argument to the jury, over appellants' objection, upon this same erroneous theory. It is, therefore, not necessary to invoke the doctrine of "plain error" in order to reverse the trial Court.

V.

APPELLANTS WERE ENGAGED IN A TRADE OR BUSINESS WITHIN THE MEANING OF THE INTERNAL REVENUE LAW.

Four persons *agreed by formal agreement*, executed some years prior to the loss in question to enter into a business and did, in fact, enter into the business and pursue the same over a course of years. All of the cases on the subject which have gone into the details

of activities are, in fact, merely probing the intention of an individual who may or may not have formed the intent to conduct particular operations as a business. Never before has the question been raised in a situation where two or more persons have agreed to enter into a particular business and have actually pursued the same. The final issue is a matter of intent, e.g., a builder may be in the building business although he never completes his first structure; a lawyer is in such business even though he never gets a case. The only reason why the Courts permit the probing of activities is to establish the intent by the overt acts. In the present cause, the intent of the four partners was established by their written contract and acts thereunder years prior to the time in question. We submit that there is no case in which two or more people have agreed by written agreement to engage in a certain business which has previously been challenged by the Government. We submit that there is no basis for such challenge and the parties to the agreement are entitled to recognition of the terms thereof. The Government cannot tell taxpayers that they may not engage in a particular business in accordance with their formal agreement.

If a profit had resulted from the sale of an interest acquired, the Government would not permit capital gain treatment. The Commissioner would take the obvious position that by their own agreements appellants were "in the business" of financing picture ventures and as such are not entitled to capital gain treatment. On the other hand, the Government now argues that the loss is a capital loss despite the fact

that by their solemn agreement and conduct appellants engaged in the business and could not realize a capital gain.

Appellee admits that one may be in the business of making loans and that one who merely made a number of loans to film companies would be in a business recognized for tax purposes. On the other hand, appellee argues that one who expends money, time and effort to locate artistic elements, and to set up production vehicles, and who raises funds and utilizes the same in the preproduction costs in connection with films, is not engaged in a business recognized for tax purposes, no matter how much money, time and effort is expended in this activity. The argument is untenable.

VI.

CONCLUSION.

We respectfully submit that the cause should be remanded to the trial Court for the computation of the amounts due appellants. In the alternative, we submit that the judgment should be reversed and the cause remanded for trial.

Dated, San Francisco, California,

June 2, 1958.

Respectfully submitted,

MAX FINK,

LEON SCHILLER,

Attorneys for Appellants.



No. 15646 ✓

**United States
Court of Appeals**
For the Ninth Circuit

*See also
Vol. 3049*

OTTO W. HEIDER,

Appellant.

vs.

SAMUEL A. McALLISTER, Trustee in Bank-
ruptcy of the Estate of Rand Truck Line, Inc.,

Appellee.

Transcript of Record

FILED

DEC 20 1957

PAUL P. GIBLIN, CLERK

Appeal from the United States District Court for the
District of Oregon



No. 15646

United States
Court of Appeals
For the Ninth Circuit

OTTO W. HEIDER,

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Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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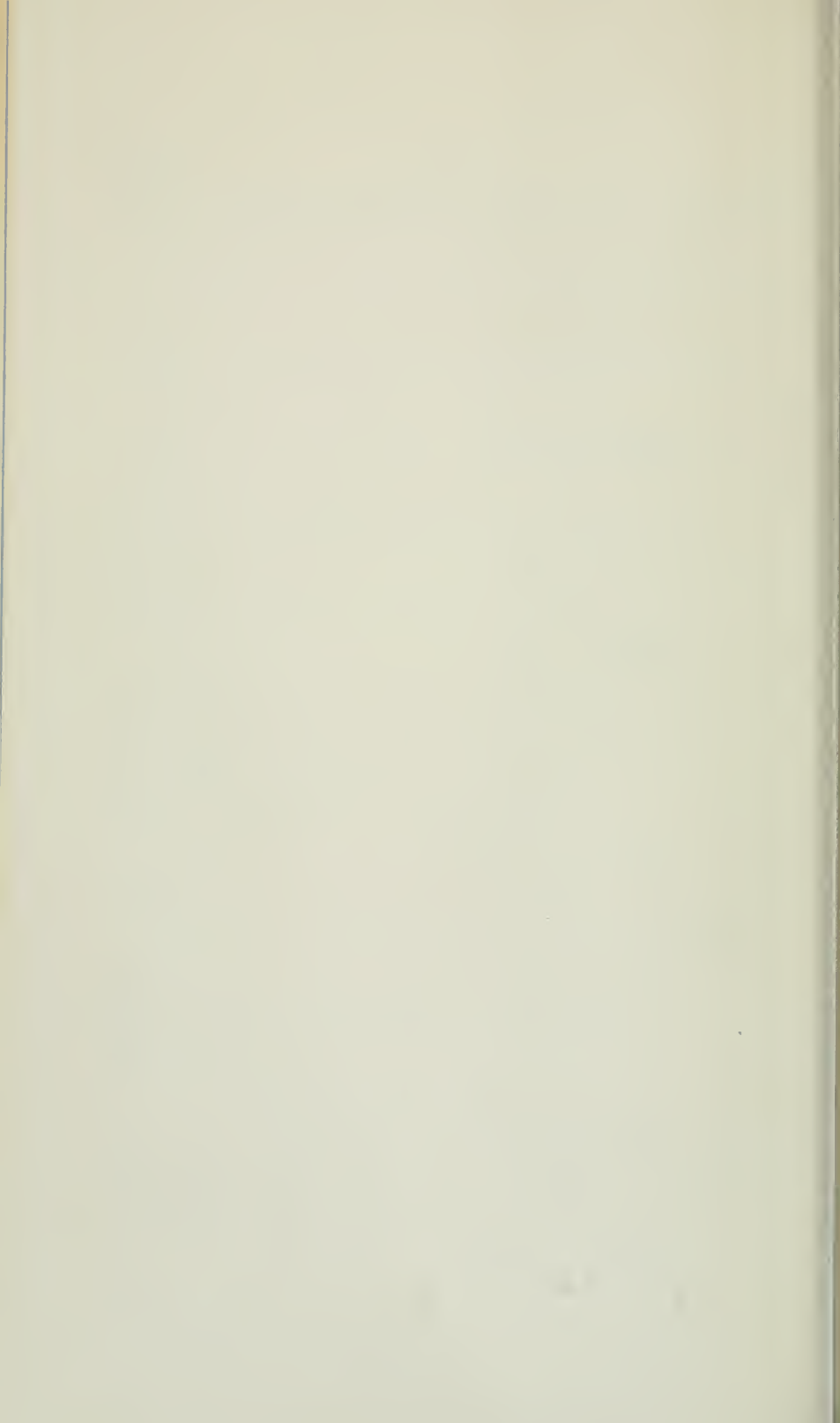
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Portland, Oregon,

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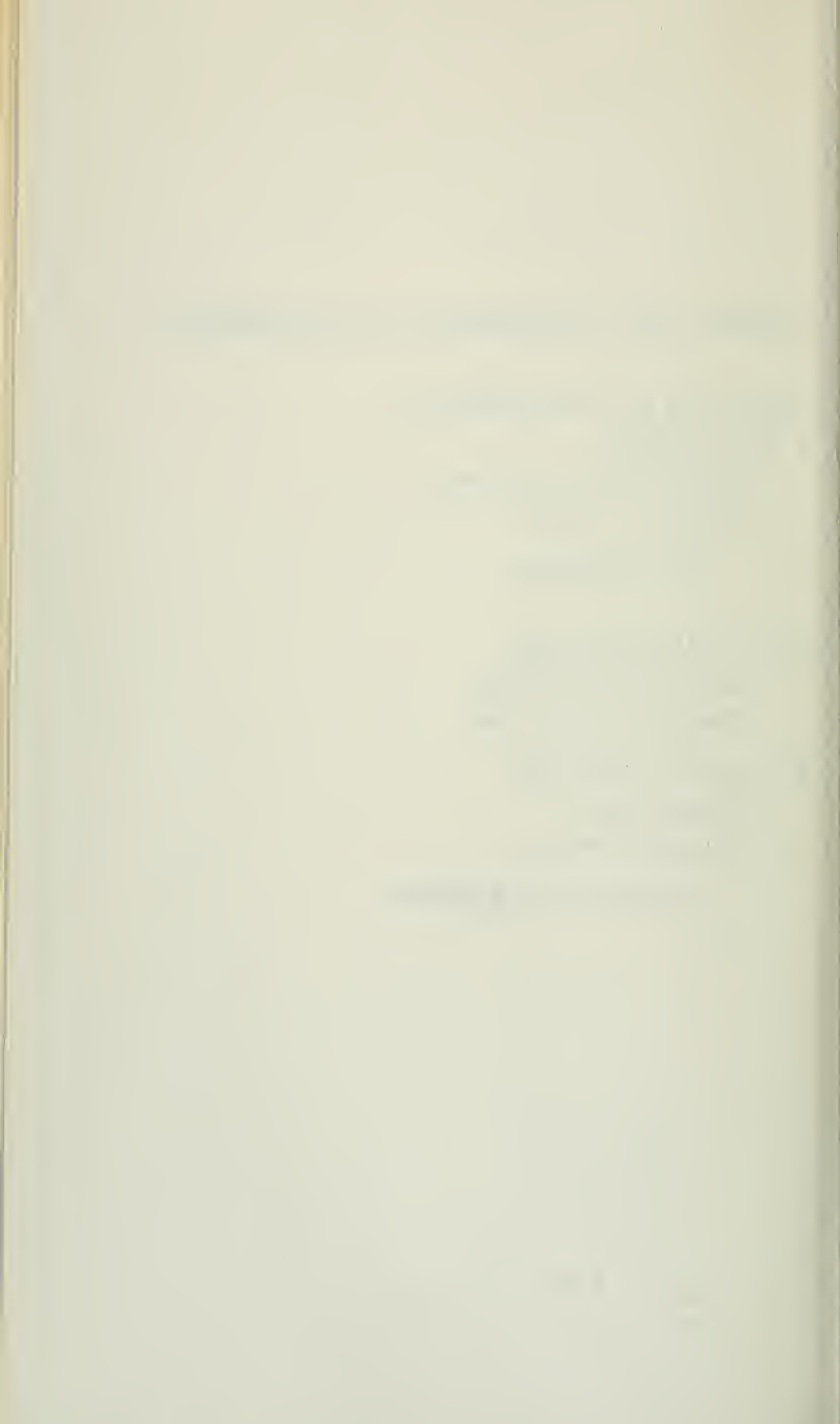
Portland, Oregon, and

F. BROCK MILLER,

Pittock Block,

Portland, Oregon,

Attorneys for Appellee.



District Court of the United States
For the District of Oregon
No. B-29990

In the Matter of:

RAND TRUCK LINE, INC., an Oregon Corporation

ORDER OF GENERAL REFERENCE
IN JUDGE'S ABSENCE

At Portland, in said district, on the 20th day of
May, 1949,

Whereas a petition was filed in this court, on the 20th day of May, 1949, by Rand Truck Line, Inc., an Oregon Corporation, the bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and whereas the judges of said court are absent from the City of Portland, and pursuant to a standing order of this court dated June 25, 1942,

It is Ordered that the above-entitled proceeding be, and it hereby is, referred to Estes Snedecor, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act.

Witness my hand and the seal of said Court.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ E. M. DAVIS,
Deputy.

[Endorsed]: Filed May 20, 1949.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Portland, in said district, on the 23rd day of May, 1949.

The petition of Rand Truck Line, Inc., filed on the 20th day of May, 1949, that it be adjudged a bankrupt under the act of Congress relating to bankruptcy, having been heard and duly considered.

It is adjudged that the said Rand Truck Line, Inc., an Oregon corporation is a bankrupt under the act of Congress relating to bankruptcy.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed May 23, 1949.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At a session of the Court of Bankruptcy, held in and for said District of Oregon, before Estes Snedecor, Referee in Bankruptcy, at Portland, Oregon, this 8th day of June, 1949.

The above-named Rand Truck Line, Inc., an Oregon corporation, having been duly adjudged a bankrupt on a petition filed by it on the 20th day of May, 1949; and Samuel A. McAllister of Portland in said District, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for

the faithful performance of his official duties in the amount fixed by the order of this court, viz., \$10,000.00; it is

Ordered that the said bond be, and it hereby is, approved.

/s/ ESTES SNEDECOR,
Referee in Bankruptcy.

[Endorsed]: Filed June 9, 1949.

[Title of District Court and Cause.]

PROOF OF SECURED DEBT

At Sheridan, in the County of Yamhill, State of Oregon, on this 23rd day of June, 1949, comes Otto W. Heider of said county and state, and makes oath and says:

(1) That he hereinafter designates himself as claimant.

(2) That said claimant is doing business at the place aforesaid, and that said corporation in whose court proceedings this proof of debt is filed was at and before the aforementioned court proceedings were filed in said court, and still is, justly and truly indebted to said claimant in the sum of \$11,500.00. That the consideration of said debt is as follows: The paying off of prior, present and current obligations, notes, mortgages and liabilities of the Rand Truck Line, outstanding and existing on the 7th day of August, 1946, together with cash disbursements, and which prior evidence of indebtedness having been heretofore returned to the makers thereof.

That no part of the balance of said debt above set forth in the sum of \$11,500.00 has been paid; that there are no offsets or counterclaims against the said sum herein alleged to be due; that deponent has not, nor has any person for and on behalf of said claimant, or to this deponent's knowledge or belief, for claimant's use, had or received any manner of security for the said debt other than as herein stated, nor has any judgment been rendered for any part thereof, nor has any note or other evidence of debt been received except as herein stated and set forth.

Affiant further says said debt herein proven, and this claim are free from usury as defined by the laws of the state of Oregon wherein the debt was contracted.

That the said claimant reserves the right and/or constitutes and appoints to attend any and all creditors' meetings of the aforesaid corporation in said proceedings above styled, for and in the name of the claimant, to vote for or against any proposal or resolution, and accept in writing or fail to accept in writing any proposal of composition or extension that may be submitted under the laws of the United States in said proceedings; to vote for the trustee, to object to confirmation of composition or extension offered in this proceedings; and to receive payment of dividends, distribution of moneys due claimant or which might be paid to claimant under any and all proceedings, and to act in said proceedings to claimant's interest with full power of substitution; and all other powers

of attorney heretofore given in regard to the above styled proceedings are hereby revoked.

That hereto attached and marked Exhibit "A" and made a part hereof as fully and completely as if incorporated herein is a combination real estate and personal property mortgage dated the 7th day of August, 1946, and filed with county clerk of Yamhill County, Oregon, on the 9th day of August, 1946, and recorded in Vol. 107, page 676, Record of Real Estate Mortgages of Yamhill County, Oregon, and was filed in the office of the Secretary of State at Salem, Oregon in the Record of Migratory Chattels, and which mortgage was executed by the Rand Truck Line, an Oregon Corporation, et al., as mortgagor, to H. H. Macy, Vern Markee, Florence Markee and Lorn Markee as mortgagees, and thereafter the said mortgage and promissory note hereto attached and made a part hereof was subsequently and on the 7th day of August, 1946, assigned and transferred for value, without notice and before maturity to the claimant who is now the owner and holder of said mortgage and promissory note herein set forth and described.

That in addition to the foregoing security, and as collateral security for the payment of the obligation herein set forth the following shares and certificates of stock in Rand Truck Line, Inc., were assigned, set over and transferred to the claimant, who is now the owner and holder thereof, and said stock is described as follows, to wit:

Certificate No. 27 for 930 shares, formerly owned by Beryl Taylor, dated April 18, 1949.

Certificate No. 26 for 615 shares, formerly owned by Rand Truck Line, Dated April 18, 1949.

Certificate No. 28 for 920 shares, formerly owned by Lorn E. Markee, dated April 18, 1949.

Certificate No. 25 for 920 shares, formerly owned by Harold H. Macy, dated April 18, 1949.

That the said claimant holds the certificates of title to said vehicles described in said mortgage, and is shown to be the legal owner thereof, and the same are briefly described as follows:

Cert. of Title No.	Year	Kind	Factory No.
A817044	1939	International tk.	8646
C1069501	1939	Chevrolet truck	T2639636 (Motor No.)
1179766	1935	Wentwin trailer	SP3103
1179543	1940	Trombly trailer	382
1143460	1936	Trailmobile tr.	SP3104
1179542	1926	Wentwin trailer	340
1143452		Utility trailer	59672
A1189570	1946	Transport van	M3L11022
1179767		Trailmobile tr.	17233
1179544	1944	Fruehauf trailer	C8632
748381	1937	International tk.	1552
1179545	1936	Trailmobile	D58507
A887489	1940	Int'l tractor	772
1162014	1945	Fruehauf tr.	C9031
A560350	1934	Int'l tk.	FAB4179 (Motor No.)
947019	1941	International tk.	1120
863473	1940	International tk.	1865
A667301	1936	International tk.	808
A948417	1941	Dodge tk.	9275402
1143451	1928	Wentwin & Irwin tra.	6290
D804590	1938	International tk.	3500
A842270	1939	International tk.	1203
B687345	1936	Chevrolet tk.	6RD0711149
A1124373	1937	Inter. tract.	DR60553
1014403	1942	Int'l tk.	3138
A1015945	1942	Int'l tk.	3115
C575985	1934	Dodge tk.	9243940

That said mortgage and note is in default in that \$1,000.00 was due on the 1st day of May, 1949, and only \$500.00 was paid on the 10th day of May, 1949, and \$1,000.00 was due on the first day of June, 1949, and no part of said monthly installment has been paid, and by reason of the breach of the terms and conditions of said mortgage the same is all due and claimant declares it all due and payable and the said mortgage is subject to immediate foreclosure, and the said note and mortgage bears interest at the rate of 8% per annum from the maturity of the monthly installments due and not paid.

/s/ OTTO W. HEIDER.

Subscribed and sworn to before me this 23rd day of June, 1949.

/s/ IRENE LAWRENCE,

Notary Public for Oregon,

My com. expires Nov. 9, 1951.

EXHIBIT A

(Original)

Mortgage

(Real and Personal)

Rand Truck Line

To

H. H. Macy, et al.

This Indenture, Made this 7th day of August in the year One Thousand Nine Hundred and forty-six,

between Rand Truck Line, an Oregon Corporation, Vern Markee, Florence Markee, his wife as mortgagors, and H. H. Macy, Vern Markee, Florence Markee and Loren Markee as mortgagee,

Witnesseth, That the said mortgagors for and in consideration of the sum of Forty-three thousand five hundred sixty 00/100 Dollars (\$43,560) to them paid by the said mortgagees, do hereby grant, bargain, sell and convey unto the said mortgagees and assigns those certain premises situated in the County of Yamhill, and State of Oregon, and described as follows:

Lot No. 5 and the North 15 ft. of Lot 6 of Block One of Morgan's Addition to the City of Sheridan, Yamhill County, Oregon, according to the duly recorded map and plat thereof, subject to any dedicated, vacated or conveyed rights heretofore by which there has been legally established an alley, easement or right-of-way for travel from the east end of the above-described property and the lots immediately to the east.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and which may hereafter thereto belong or appertain, and the rents, issues and profits therefrom, and any and all fixtures upon said premises at the time of the execution of this mortgage or at any time during the term of this mortgage.

To Have and to Hold the said premises with the appurtenances unto the said mortgagee and assigns forever.

This Conveyance is intended as a Mortgage to secure the payment of the sum of Forty-three thousand five hundred sixty and 00/100 Dollars (\$43,560.00) in accordance with the terms of a certain promissory note of which the following is substantially a copy, to wit:

It is understood definitely that the Rand Truck Line and/or mortgagors will do their own insuring as to public liability and property damage, fire, theft and collision at their own expense, and that the legal owner of said equipment and holder of this mortgage is under no obligation in connection therewith.

This mortgage is executed for a present and current consideration to take up present and outstanding obligations of mortgagor, and is not given for any past consideration.

This indenture is further conditioned upon the faithful observance by the mortgagors of the following covenants hereby expressly entered into by the mortgagor, to wit:

That they are lawfully seized of said premises, and now have a valid and unincumbered fee simple title thereto, and that they will forever warrant and defend the same against the claims and demands of all persons whomsoever;

That they will pay the said promissory note and all installments of interest thereon promptly as the same become due, according to the tenor of said note;

That so long as this mortgage shall remain in force they will pay all taxes, assessments, and other charges of every nature which may be levied or assessed upon or against the said premises when due and payable, according to law, and before the same become delinquent, and will also pay all taxes which may be levied or assessed on this mortgage or the debt thereby secured, and will promptly pay and satisfy any mechanic's liens or other incumbrances that might by operation of law or otherwise become a lien upon the mortgaged premises superior to the lien of this mortgage;

That they will keep all the improvements erected on said premises in good order and repair and will not commit or suffer any waste of the premises hereby mortgaged;

That so long as this mortgage shall remain in force they will keep the buildings now erected, or any which may hereafter be erected on said premises, insured against loss or damage by fire to the extent of \$ none in some company or companies acceptable to said mortgagee and for the benefit of said mortgagee, and will deliver all the policies and renewals thereof to said mortgagee.

Now, Therefore, if the said mortgagors shall pay said promissory note, and shall fully satisfy and comply with the covenants hereinbefore set forth, then this conveyance shall be void, but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory note in accordance with the terms thereof and the perform-

ance of the covenants and agreements herein contained; it being agreed that any failure to make any of the payments provided for in said note or this mortgage when the same shall become due or payable, or to perform any agreement herein contained, shall give to the mortgagees the option to declare the whole amount due on said note, or unpaid thereon or on this mortgage, at once due and payable and this mortgage by reason thereof may be foreclosed at any time thereafter. And if the said mortgagors shall fail to pay any taxes or other charges or any lien or insurance premium as herein provided to be done, the mortgagees shall have the option to pay the same and any payment so made shall be added to and become a part of the debt secured by this mortgage, and draw interest at the rate of ten per cent per annum, without waiver, however, of any right arising from breach of any of the covenants herein.

In case a complaint is filed in a suit brought to foreclose this mortgage, the court shall, upon motion of the holder of the mortgage, without respect to the condition of the property herein described, appoint a receiver to collect the rents and profits arising out of said premises, and apply such rents and profits to the payment and satisfaction of the amount due under this mortgage, first deducting all proper charges and expenses attending the execution of such trust.

In the event of suit or action being instituted to foreclose this mortgage, the mortgagors and/or their

assigns shall pay such sum as the Court shall consider reasonable, as attorneys' fees for the benefit of the plaintiff, in addition to the costs and disbursements provided by statute.

As to the personal property the following shall apply: But if default shall be made in the payment of said debt, interest charges, or payments or any conditions of said mortgage, according to the terms of the said note or if first parties shall offer for sale, sell, assign, encumber or dispose of all or any part of said goods and chattels, or shall remove or attempt to remove all or any part thereof from the above-described premises without the written consent of the mortgagee or holder of this mortgage, whether said indebtedness shall be then due or not, or if the representations of first parties herein contained are in whole or in part untrue, then and from thenceforth it shall be lawful and the mortgagee, its agents, successors and assigns are hereby authorized to sell all or any part of the said property for cash at private sale or public auction for the best price that it can obtain and first parties waive personal notice thereof, or any other kind of notice, and the mortgagee may buy at such sale and the said property may be so sold in bulk or in parcels, or so much thereof as shall be necessary to satisfy the said debt, interest and charges, plus lawful expenses of sale, and reasonable attorney's fee, if any, and the mortgagee may retain all the said amounts out of the proceeds of said sale, and shall return the overplus, if any, to first parties; for the purpose of enforcing the provisions and conditions

hereof the mortgagee, its agents, successors and assigns are hereby authorized and empowered to enter upon the premises of first parties or any place where said goods and chattels or any part thereof may be found, and take possession thereof and dispose of the same as hereinbefore provided.

If there is only one first party to this instrument, all plural words used herein with reference to first parties shall be construed in the singular. Acceptance by the mortgagee or any holder of this mortgage, of any payment hereon after the same is due, shall not constitute a waiver by such holder of this or any other provision of this mortgage, and time is the essence hereof.

Any deficiency and shortage unpaid sale and seizure of the property herein described the mortgagor or mortgagors shall immediately pay, and do hereby confess judgment for such shortage or unpaid deficiency, and any circuit court in the state of Oregon shall have jurisdiction in the foreclosure of this mortgage; the chattel mortgage portion of this mortgage may be foreclosed by the holder thereof without the intervention of any court being taken, but in a summary manner as herein provided.

In Witness Whereof, the said mortgagors have hereunto set their hands and seals the day and year first above written. By resolution of its board of directors and its stockholders has caused these presents to be executed by its President, Secretary-Treasurer and General Manager, and its corporate seal to be hereunto affixed this 7th day of August, 1946.

[Seal]

RAND TRUCK LINE,
A Corporation,By /s/ FLORENCE MARKEE,
Secy.-Treas., Personally &
Individually.

[Seal]

RAND TRUCK LINE,
A Corporation,By /s/ VERN MARKEE,
President.

[Seal]

RAND TRUCK LINE,
A Corporation,By /s/ H. H. MACY,
General Manager.

/s/ LOREN E. MARKEE,

/s/ FLORENCE MARKEE.

Acknowledgment

State of Oregon,
County of Yamhill—ss.

On this 7th day of August, 1946, before me appeared Vern Markee, Florence Markee and H. H. Macy, to me personally known, who being duly sworn, did say that he, the said Vern Markee is the President, and she, the said Florence Markee is the Secretary-Treasurer, and he, the said H. H. Macy is the General Manager of the within named corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in

behalf of said corporation by authority of its Board of Directors, and the said Vern Markee, Florence Markee and H. H. Macy acknowledge said instrument to be the free act and deed of said corporation.

In Testimony Whereof I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate written.

[Seal] /s/ IRENE LAWRENCE,
Notary Public in and for Said
County and State.

My commission expires Nov. 3, 1947.

Sheridan, Oregon, Aug. 7, 1946.

\$43,560.00

For value received I promise to pay to the order of H. H. Macy, Vern Markee, Florence Markee and Loren Markee at McMinnville, Oregon, Forty-three thousand five hundred sixty and 00/100 Dollars in lawful money of the present standard value, with interest thereon in like lawful money at the rate of 8% per annum from maturity until paid, payable in monthly installments of not less than \$1,000.00 in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on the 1st day of September, 1946, and a like payment on the 1st day of each month thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest, to become immedi-

ately due and collectible at the option of the holder of this note. In case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorneys fees in said suit or action.

[Seal]

RAND TRUCK LINE,
A Corporation,

By /s/ FLORENCE MARKEE,
Secy.-Treas.

[Seal]

RAND TRUCK LINE,
A Corporation,

By /s/ VERN MARKEE,
President.

[Seal]

RAND TRUCK LINE,
A Corporation,

By /s/ H. H. MACY,
General Manager.

/s/ LOREN E. MARKEE.

Assignment & Guarantee

Sheridan, Ore., Aug. 7, 1946.

For value received I hereby guarantee the payment of the within note, consent to any extension of time granted the maker, and waive protest, demand and notice of non-payment thereof, and in case suit or action is instituted upon this guaranty for the collection of the within note, I promise to pay such

sum as the Court may adjudge reasonable as attorney's fees in such suit or action, all to the same extent as if I were a maker hereof.

/s/ VERN MARKEE,

/s/ FLORENCE MARKEE,

/s/ H. H. MACY,

/s/ LOREN E. MARKEE.

State of Oregon,
County of Yamhill—ss.

On this the 7th day of Aug., A.D. 1946, personally came before me a Notary Public in and for said County and State, the within-named Loren E. Markee, and Florence Markee, his wife, to me personally known to be the identical persons who executed the within instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein named.

In Testimony Whereof, I have hereunto subscribed my name and affixed my Notarial seal, the day and year last above written.

[Seal] /s/ IRENE LAWRENCE,

Notary Public in and for the
State of Oregon.

My Commission Expires Nov. 3rd, 1947.

[Endorsed]: Filed June 30, 1949, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

[Title of District Court and Cause.]

OBJECTIONS TO PROOF OF DEBT
OF OTTO W. HEIDER

To: The Honorable Estes Snedecor, Referee in
Bankruptcy:

I, Samuel A. McAllister, Trustee in Bankruptcy, do hereby object to the Proof of Debt filed herein by Otto W. Heider, an alleged secured creditor of the bankrupt herein, for the sum of \$11,500.00, upon the following grounds and reasons:

As My First Objection Thereto:

I.

I deny each and every allegation, thing and matter contained in said Proof of Debt and the whole thereof, except as hereinafter specifically set out and admitted.

As My Second Objection Thereto, I allege:

I.

That said purported debt is the claimed balance upon a purported mortgage claimed to have been executed by the bankrupt herein under the following circumstances and conditions:

1. That on or about the 28th day of September, 1944, and at a time when the assets of said bankrupt did not exceed its liabilities and at a time when said bankrupt was operating at a net loss, Vern Markee, Florence Markee and Loren Markee pur-

chased 4,000 shares of the capital stock of the Rand Truck Line, Inc., from Robert R. Rand and Mrs. R. R. Rand, also known as Golda I. Rand; that Otto Heider loaned and advanced to the said Vern Markee, Loren Markee and Florence Markee, and paid to the said Robert R. Rand and Mrs. R. R. Rand, also known as Golda I. Rand, for and on their behalf to aid and assist them to purchase said stock, the sum of \$31,500.00; that the said Vern Markee, Florence Markee and Loren Markee attempted to bind and obligate the said Rand Truck Line, Inc., a corporation, to the payment of such personal obligations, namely, payment to Otto Heider of the moneys advanced by the said Otto Heider to the said Vern Markee, Florence Markee and Loren Markee individually for the purchase of said capital stock by causing the said bankrupt, acting through the said Vern Markee, Florence Markee and Loren Markee, to execute a purported note and mortgage in the face amount of \$43,560.00 including interest, in favor of Mrs. R. R. Rand, also known as Golda I. Rand, which said note and mortgage was immediately and as a part of the same transaction delivered to the said Otto Heider.

2. That between September 28, 1944, and until August 7, 1946, the officers, directors and stockholders of said bankrupt diverted and caused to be diverted to their own use and benefit and paid and caused to be paid to the said Otto Heider upon said purported note and mortgage large sums of money belonging to and owned by the bankrupt herein,

namely, approximately \$1,000.00 per month during said period; that on and at a time when there remained a purported balance of \$13,168.00 upon said alleged note and mortgage, a second and subsequent purported note and mortgage was executed by said parties, purporting to bind the bankrupt herein to pay said balance in addition to other moneys then advanced by the said Otto Heider on behalf of the said bankrupt; that thereafter said Vern Markee, Florence Markee, Loren Markee and other agents of said bankrupt continued to divert and cause to be diverted and paid to the said Otto Heider upon said purported second note and mortgage additional large sums of money belonging to and owned by said bankrupt, namely, approximately \$1,000.00 per month until the month of May, 1949; that as the result of such payment so made and so received by the said Otto Heider, more than \$40,000.00 of moneys owned by the said bankrupt were diverted from said corporation and the creditors of said corporation and applied upon the aforesaid individual debts and obligations of the stockholders of the bankrupt herein; that the said Otto Heider, with full knowledge that such sums of money belonged to and were assets of said bankrupt corporation, received and accepted the same and attempted to apply the same in payment of said personal obligations of the said stockholders. That no part of said sums have been repaid to the said bankrupt or to your trustee.

3. That during said period of time, namely, between September 28, 1944, and May 20, 1949, the

said bankrupt did not earn any profits, in excess of operating costs, and did not have nor acquire any surplus funds; that the debts and liabilities of the said bankrupt increased and continued to increase during said period, and remained unpaid to and including the date of adjudication in bankruptcy herein; that the moneys paid out and received as hereinabove alleged were not paid out of net profits or surplus; that the execution of said purported notes and mortgages and payment of the moneys paid out and received as aforesaid rendered and caused the bankrupt herein to become and be insolvent and bankrupt, and unable to pay its debts in the ordinary course of business, and with liabilities exceeding in amount the value of its assets, taken at a fair valuation and exclusive of such moneys so paid and received as herein alleged. That at the time of its adjudication in bankruptcy herein the said Rand Truck Line, Inc., was indebted to various firms and persons and corporations in a total approximate amount of \$40,000.00. That the execution of said purported notes and mortgages and the payments of money paid out and received as hereinabove alleged, hindered, delayed and defrauded creditors of the bankrupt herein, and were intended to and did deprive said creditors of the assets of said corporation and were intended to and did attempt to discharge the aforesaid personal obligations of the stockholders of the bankrupt herein to Otto Heider, to the detriment and damage of such creditors of said corporation.

4. That the said Rand Truck Line, Inc., received nothing of value nor any consideration whatsoever in return for the execution of the first note and mortgage or payment of such personal obligations of the stockholders; that the Articles of Incorporation of the said bankrupt give or grant to said corporation no power to pledge its credit or borrow money for or on behalf of its stockholders, directors, or any other persons whatsoever, or to purchase its own stock for and on behalf of itself or any other person; that the purported execution of the said alleged notes and mortgages, and the payment of said sums, as hereinabove alleged to the said Otto Heider, was and is beyond the power and authority of said corporation, its officers or directors.

And for My Third Objection to Said Alleged Proof of Debt, I allege:

I.

That on or about the 28th day of September, 1944, the said Otto Heider advanced for the use and benefit of the stockholders of the bankrupt herein the sum of \$36,500.00, and the said stockholders attempted to bind the bankrupt herein to repay the sum of \$43,560.00 in payment therefor, and caused said bankrupt to execute a note and mortgage purportedly agreeing to repay said sum of \$43,560.00; that included in the amount of said purported note and mortgage in addition to the alleged principal sum was the sum of \$7,060.00 as prepaid interest; that said prepaid interest was computed and in-

cluded at a rate and in amounts in excess of 10% per annum, namely, at a rate of approximately 10.40% per annum.

II.

That subsequently thereto and after payments had been made by said bankrupt in the amount of \$30,392.00 upon said purported note and mortgage, with a claimed balance due thereon of \$13,168.00, or \$6,108.00 excluding said item of purported prepaid interest, in consideration of claimed advances of \$22,529.00 to the bankrupt, the stockholders of said bankrupt herein caused the said bankrupt to execute a purported note and mortgage in the amount of \$43,560.00, which note and mortgage purported to include the alleged balance upon said first note and mortgage of \$13,168.00, such claimed advances of \$22,529.00 and prepaid interest in the amount of \$7,533.00. That said prepaid interest was computed and included at a rate and in amounts in excess of 10% per annum, namely, at a rate of approximately 11.275% per annum if the prepaid interest item of said first purported note and mortgage is included in the alleged principal amount or approximately 28.1% if the prepaid interest item of said first purported note and mortgage is excluded therefrom.

III.

That the purported agreements of the bankrupt to pay said sums representing prepaid interest were demanded and received by the aforesaid Otto Heider as the purported consideration for the alleged extension of time evidenced by said purported

notes and mortgages for the payment of said alleged debts and were included and added to the balances claimed to be due from the bankrupt to Otto Heider knowingly and with the intent on the part of the said Otto Heider to collect and receive and to have the said bankrupt pay interest on such claimed indebtednesses at a rate in excess of 10% per annum.

IV.

That the said Otto Heider received and accepted said purported notes and mortgages with full knowledge of the facts herein alleged.

V.

That funds of the bankrupt in excess of \$59,029.00 were paid to the said Otto Heider, and any purported balance claimed to be due to the said Otto Heider on said purported notes and mortgages were and are balances representing usurious interest charges computed at a rate in excess of 10% per annum, as hereinabove set out.

Wherefore, your trustee prays for an Order of this Court sustaining his objections, and all of them, to the said claim filed herein by the said Otto Heider, and for such other Orders as to this Court seem just and equitable.

/s/ SAMUEL A. McALLISTER,
Trustee.

Duly verified.

[Title of District Court and Cause.]

NOTICE OF TIME SET FOR HEARING OF
OBJECTIONS TO PROOF OF DEBT OTTO
W. HEIDER

To: Otto W. Heider, Sheridan, Oregon:

You Are Herewith Notified that the hearing upon the objections to Proof of Debt filed by you in the above-entitled proceedings has been set for hearing before the Honorable Estes Snedecor, Referee in Bankruptcy, in Room 521, United States Court House, Portland, Oregon, on the 28th day of February, 1956, at the hour of 2:00 o'clock p.m.

Dated this 26th day of January, 1956.

/s/ C. X. BOLLENBACK,
Attorney for Trustee.

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1956.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

[Title of District Court and Cause.]

SUPPLEMENTAL OBJECTIONS TO CLAIM
OF OTTO HEIDER

Comes now Samuel A. McAllister, Trustee and for his fourth objection to said Proof of Claim alleges as follows:

That said claimant is in effect asking this Court to foreclose upon his alleged mortgage, and the facts

and circumstances surrounding execution of said mortgage and the subsequent dealings between said claimant and the mortgagors are a violation of the "clean hands" doctrine and in fact are as follows:

1. That said loan on the part of said claimant was made to Verne Markee, Florence Markee and Loren Markee as a personal loan, but with the knowledge and consent of said claimant, the mortgage was executed to give the appearance of a corporate indebtedness and mortgage.

2. That the interest rate provided for by said claimant is usurious.

3. That said claimant accepted payments upon said mortgage which were in fact diversion of corporation assets with full knowledge that such assets were being diverted.

Wherefore Trustee renews his prayer that the claim of lien and claim of said Otto Heider be disallowed in its entirety.

/s/ SAMUEL A. McALLISTER.

State of Oregon,
County of Multnomah—ss.

I, Samuel A. McAllister, being first duly sworn, depose and say:

That I am the trustee of the above-entitled estate in bankruptcy; that I have read the within and

foregoing petition, know the contents thereof, and the same are true as I verily believe.

/s/ SAMUEL A. McALLISTER.

Subscribed and sworn to before me this 14th day of March, 1956.

[Seal] /s/ F. BROCK MILLER,
Notary Public for Oregon.
My Commission Expires: November 3, 1957.

[Endorsed]: Filed March 14, 1956, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

[Title of District Court and Cause.]

MOTION TO DISMISS

To: The Honorable Estes Snedecor, Referee in Bankruptcy:

Otto W. Heider, a creditor of the bankrupt herein, moves the Court to dismiss the objections to proof of debt of Otto W. Heider on the ground that the Bankruptcy Court is without jurisdiction to entertain these objections because the same matter has been submitted to the Circuit Court for the State of Oregon, for the County of Multnomah, in the case of Samuel A. McAllister, Trustee in Bankruptcy for Rand Truck Line, Inc., a bankrupt, vs. Vern Markee, Florence Markee, his wife, Loren Markee, Harold Macy, Beryl B. Taylor and Otto Heider, Docket No. 190-145, by authority of the

Honorable Estes W. Snedecor, Referee in Bankruptcy.

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Creditor.

[Endorsed]: Filed March 14, 1956, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(Claim of Otto W. Heider and
Objections of Trustee thereto)

This matter having come on for hearing upon the 14th day of March, 1956, upon the claim of Otto W. Heider filed herein and the Objections of the Trustee thereto, the Trustee appearing personally and by and through his attorneys, C. X. Bollenback and F. Brock Miller, and Otto W. Heider, the Claimant herein, appearing personally and by and through his attorney, William E. Dougherty, evidence having been adduced upon the respective parties and the Court having considered the matter and being fully advised in the premises, make the following:

Findings of Facts

I.

That on or about the 28th day of September, 1944, Vern Markee, Florence Markee and Loren Markee

purchased 4,000 shares of the capital stock of the said Bankrupt from Robert R. Rand, Mrs. Robert R. Rand and a Mrs. Potts; that Otto W. Heider loaned and advanced to the said Vern Markee, Loren Markee and Florence Markee and paid to the said Robert R. Rand, Mrs. Robert R. Rand and Mrs. Potts, for and on behalf of Vern Markee, Loren Markee and Florence Markee, to aid and assist the said Markees to purchase said stock the sum of Thirty-Two Thousand Dollars (\$32,000); that the said Vern Markee, Loren Markee and Florence Markee attempted to bind and obligate the Bankrupt herein, Rand Truck Line, Inc., a corporation, to the payment of such personal obligation, namely, payment to Otto W. Heider of the monies advanced by the said Otto W. Heider to the said Markees individually for the purchase of such said capital stock by causing the said Bankrupt herein, acting through the said Markees, to execute a note and mortgage in the face amount, including prepaid interest, \$43,560, in favor of Mrs. Robert R. Rand, also known as Goldie I. Rand, which said note and mortgage was immediately and as a part of the same transaction assigned and delivered to the said Otto W. Heider.

II.

That between September 20th, 1944, and August 7th, 1946, the officers, directors and stockholders of the said Bankrupt diverted and caused to be diverted to their own use and benefit and paid and caused to be paid to the said Otto W. Heider, upon said note and mortgage, large sums of money be-

longing to and owned by the Bankrupt herein, namely, Twenty-Four Thousand Five Hundred and No/100 Dollars (\$24,500): that on or about August 7, 1946, and at a time when there remained a balance of Thirteen Thousand One Hundred and Sixty-Eight and No/100 Dollars (\$13,168) upon said note and mortgage, a second and subsequent note and mortgage were executed by the said Rand Truck Line, Inc., to and in favor of the said Markees purporting to bind the Bankrupt herein to pay the sum of Forty-Three Thousand Five Hundred and Sixty Dollars (\$43,560) which sum included said balance and the sum of Twenty-Two Thousand Two Hundred and Fifty-Eight Dollars (\$22,258) then paid by the said Otto W. Heider to and on behalf of the Rand Truck Line, Inc., Bankrupt herein and pre-paid interest on said sums. That said note and mortgage was forthwith delivered to the said Otto W. Heider that thereafter the said Markees and other agents of said Bankrupt continued to divert and cause to be diverted and paid to the said Otto W. Heider upon said second note and mortgage additional large sums of money in excess of Thirty-Two Thousand and Sixty Dollars (\$32,060) belonging to and owned by the Bankrupt herein.

III.

That the bankrupt herein received nothing of value nor any consideration whatsoever in return for the execution of the first note and mortgage or payment of such personal obligations of the stockholders. That the money paid to and on behalf of the

Bankrupt herein at the time of the execution of the second mortgage constituted and was a partial repayment of the monies theretofore diverted from said corporation; that at the time of and after such partial repayment there remained a balance still due said corporation by reason of such diversion the sum of Two Thousand Two Hundred and Forty-Two Dollars (\$2,242); that all of the subsequent diversion of funds from the corporation and its creditors and the payment thereof to Otto W. Heider were to the detriment of its then existing creditors and for the individual use and benefit of the stockholders of said corporation.

IV.

That as a result of such payments so made and so received by the said Otto W. Heider a net sum of not less than Thirty-Four Thousand Three Hundred and Two Dollars (\$34,302) of monies owned by the said Bankrupt herein were diverted from said corporation and applied upon the aforesaid individual debts and obligations of the stockholders of the Bankrupt herein; that the said Otto W. Heider with full knowledge that such sums of money belonged to and were the assets of said Bankrupt corporation received and accepted the same and attempted to apply the same in payment of said personal obligations of the said stockholders; that no part of said sums have been repaid to the said Bankrupt or to the Trustee herein.

V.

During the period of time between September 28, 1944, and May 20, 1949, the Bankrupt herein did not

earn any profits, in excess of operating costs, and did not have nor acquire any surplus funds; that the debts and liabilities of said Bankrupt increased and continued to increase during said period, and remained unpaid to and including the date of adjudication in bankruptcy herein; that the monies so paid out and received as hereinabove found, were not paid out of net profits or surplus; that the execution of the said notes and mortgages and payment of the monies paid out and received as aforesaid, rendered and caused the Bankrupt herein to become and be insolvent and bankrupt and unable to pay its debts in the ordinary course of business, and with liabilities exceeding in amount the value of its assets, taken at a fair valuation and exclusive of such money so paid and received as herein found; that at the time of its adjudication in bankruptcy herein, the said Rand Truck Line, Inc., Bankrupt herein, was indebted to various firms and persons and corporations in a total approximate amount of Forty Thousand Dollars (\$40,000); that the claims of some of such creditors existed prior to August 7, 1946, and continued to exist subsequent to August 7, 1946, up to and including the time the petition in bankruptcy was filed herein; that the execution of said notes and mortgages and the payments of money paid out and received as hereinabove alleged, hindered, delayed and defrauded the creditors of the bankrupt herein and were intended to by the parties to such transactions and did deprive said creditors of the assets of said corporation and were intended to and did

attempt to discharge the personal obligations of the stockholders of the Bankrupt herein, to Otto W. Heider, to the detriment and damage to said creditors of said Bankrupt.

VI.

That the Articles of Incorporation of the said Bankrupt give or grant to such corporation no power or pledge its credit or borrow for or on behalf of its stockholders, directors or any other persons whatsoever to purchase its own stock for or on behalf itself or any other person. That the execution of the said notes and mortgages and the payment of such sums as hereinabove alleged was and is beyond the power and authority of said corporation, its officers or directors.

VII.

That there was included in each of said mortgages hereinabove described prepaid interest at a rate and in an amount in excess of 10% per annum; that the agreements of the Bankrupt herein to pay such sums representing prepaid interest were demanded and received by the said Otto W. Heider as the consideration for the extension of time evidenced by said notes and mortgages for the payment of said debts and were included and added to the balances claimed to be due from the Bankrupt to Otto W. Heider knowingly and with the intent on the part of the said Otto W. Heider to collect and receive and to have the said Bankrupt pay interest upon said indebtedness at a rate in excess of 10% per annum; that the said Otto W. Heider received and accepted said notes and mortgages with full knowledge of the

facts hereinabove stated; that the said Otto W. Heider has received out of the assets of this corporation, funds in excess of any monies advanced by him to any person whatsoever as the result of any transactions hereinabove set out; that the balance represented by the claim of the said Otto W. Heider filed herein was and is a balance representing only interest charges computed upon such sums so advanced at a rate in excess of 10% per annum.

VIII.

That Otto W. Heider has not been prejudiced by any delay in filing objections to his claim herein.

Based upon the foregoing Findings of Fact, the Court draws the following:

Conclusion of Law

The claim of Otto W. Heider herein, based upon said notes and mortgages, should be denied.

Dated this 1st day of October, 1956.

/s/ ESTES SNEDECOR,
Referee.

Affidavit of service by mail attached.

[Endorsed]: Filed October 1, 1956, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

In the United States District Court for the
District of Oregon

No. B 29,990—In Bankruptcy

In the Matter of:

RAND TRUCK LINE INC., an Oregon Corporation,

Bankrupt.

ORDER

Based upon Findings of Fact and Conclusions of Law made and entered herein on the 1st day of October, 1956;

It Is Ordered that the purported notes and chattel mortgages held by Otto W. Heider, upon the assets of the bankrupt herein be, and the same hereby are, held to be void and of no effect whatsoever, and

It Is Further Ordered that the claim of the said Otto Heider filed herein, based upon the claimed balance due upon said notes and mortgages be, and the same hereby is denied and disallowed in all respects.

Dated this 2nd day of October, 1956.

/s/ ESTES SNEDECOR,
Referee.

[Endorsed]: Filed October 2, 1956, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: The Honorable Estes Snedecor, Referee in
Bankruptcy:

The petition of Otto W. Heider, respectfully
represents:

1. That your petitioner is a duly qualified creditor of the above-named Bankrupt.

2. That on the 2nd day of October, 1956, an order was made by the Referee herein, and filed in this Court, a copy whereof is hereto annexed, marked Exhibit A, and made a part hereof.

Your petitioner, being aggrieved by the said order, prays for a review thereof, and complains that the Referee committed error in making the said order in the following particulars:

a. The Bankruptcy Court was and is without jurisdiction to entertain the objections to the claim of your petitioner, upon which said order is based, because the same matter was by the direction and authority of the Referee in Bankruptcy submitted to the jurisdiction of the Circuit Court of the State of Oregon, for the County of Multnomah, in the case of Samuel A. McAllister, Trustee in Bankruptcy for Rand Truck Line, Inc., a bankrupt, vs. Vern Markee, Florence Markee, his wife; Loren Markee, Harold Macy, Beryl B. Taylor and Otto Heider, being Docket No. 190-145 in said Court.

b. The Referee in Bankruptcy should not have considered the objections of the Trustee to the claim

of your petitioner, upon which objections said order is based, because there was undue laches upon the part of said Trustee which had a material adverse effect upon your petitioner, in that the Trustee was to file any objections to the claim which he had after the hearing in this cause on July 6, 1949, but did not do so for nearly seven years thereafter, and accordingly the stale objections should not have been considered at the subsequent hearing on March 14, 1956.

c. That said order is not, in fact or in Law, supported by the findings of fact entered herein by said Referee.

d. That all parts of said findings of fact, material to the claim of your petitioner, are not only clearly erroneous but also false, as shown by the record in this proceeding.

Wherefore, petitioner prays that said order be reviewed by a Judge of this Court and that the Referee promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of the questions presented and a transcript of the evidence taken at the hearing, together with all exhibits therein offered.

TOOZE, KERR, HILL,
DOUGHERTY & TOOZE,
/s/ WILLIAM E. DOUGHERTY,
Attorneys for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 10, 1956, Referee.

[Endorsed]: Filed October 23, 1956, U. S. D. C.

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON PETITION
OF OTTO W. HEIDER FOR REVIEW OF
REFEREE'S ORDER OF OCTOBER 2, 1956

To the Honorable Judges of the Above-Entitled
Court:

Estes Snedecor, the Referee in Bankruptcy in charge of this proceeding, hereby makes this his certificate on the petition of Otto W. Heider for a review of the Referee's order entered October 2, 1956, denying and disallowing the chattel mortgage claim of Otto W. Heider.

Questions Presented

The questions presented are set forth in the Petition for Review, which accompanies this certificate.

Facts

A brief chronology of the proceedings will form a vivid and helpful background to the jurisdictional and other controversies under review.

Rand Truck Line, Inc., was adjudged a bankrupt upon its voluntary petition filed May 20, 1949. Immediately Beryl B. Taylor was appointed receiver to continue the operation of the trucks until the appointment of a trustee at the first meeting of creditors held June 7, 1949, at which time Samuel A. McAllister was appointed trustee.

In order to preserve the going values of the operating permits and to curtail operating losses, the

trustee very promptly on June 20, 1949, filed a petition challenging the validity of Otto W. Heider's mortgage and requesting an order requiring Heider to appear on July 6, 1949, and show cause why the property of the bankrupt should not be sold free from liens, the proceeds to be impressed with such liens as the court should determine to be valid. Heider appeared at the hearing and asserted a mortgage on the tangible assets of the bankrupt, upon which he claimed a balance owing of \$11,500, plus accruing interest.

Following this hearing on July 21, 1949, the Referee entered an order authorizing the sale of the tangible assets and operating rights of the bankrupt free from the lien of the mortgage claimed by Otto W. Heider, and providing that the proceeds of the sale be impressed with the lien of such mortgage or claimed mortgage, the court expressly reserving the right and power to determine the validity or amount due upon such mortgage.

After advertising and upon due notice to creditors, the property was sold to Clement M. Risberg for \$20,000 cash. The order authorizing the sale free from liens entered September 1, 1949, provided that the proceeds of the sale shall be impressed with the liens found upon the personal property so sold "with this court reserving the power to determine the validity and amount of all such liens."

On the same day, September 1, 1949, the trustee promptly filed a petition alleging that certain stock-

holders of the bankrupt had converted corporate funds to their own use, and had applied them to the payment of personal obligations owing to Otto Heider. The trustee requested authority to institute an action in the State Court against the stockholders and Otto Heider for the recovery of said corporate funds. An order was entered on the same day authorizing action. Such an action was filed in the Circuit Court of the State of Oregon for the County of Multnomah on September 19, 1949. This case has been pending in the State Court for more than 7 years upon various motions and demurrers and is still not at issue.

The action in the State Court is for the recovery of corporate funds and only indirectly involves the question of the validity of the Heider mortgage. The trustee finally decided not to await the outcome of the litigation against the stockholders and to invoke the summary jurisdiction reserved to the Bankruptcy Court for the purpose of determining the validity of the Heider chattel mortgage. Consequently, formal objections were filed to the mortgage claim and were heard before the Referee on March 14, 1956. During the hearing Heider was requested to produce a photostatic copy of the original mortgage to be marked Exhibit 32 and was given the privilege of introducing additional evidence in connection with the Long note if he so desired. In view of the complicated facts, Mr. Boll-enback agreed to submit a written summary of the evidence and to file the trustee's memorandum of

authorities. This was done on March 27, 1956. In the absence of an answering brief to be filed by Mr. Dougherty, Mr. Bollenback addressed a letter to the Referee with a copy to Mr. Dougherty requesting that the court set a time within which any additional evidence must be produced and briefs submitted by Heider. On June 12, 1956, the Referee addressed a letter to Mr. Dougherty referring to Mr. Bollenback's letter of May 28 and stating that Mr. Heider had failed to furnish the photostatic copy of the original chattel mortgage and that Mr. Dougherty had not submitted a brief upon the questions of law involved in the hearing before the court on March 14, 1956. The Referee advised Mr. Dougherty that, unless a brief was filed on or before June 25, the Referee would proceed to make findings upon the record now before the Court. Mr. Dougherty telephoned for additional time which was granted to him but no brief was filed and no request was made for the introduction of further evidence or for oral argument. Finally, on September 10, 1956, findings of fact and conclusions of law were submitted by Mr. Bollenback and copies were transmitted to Mr. Dougherty with notice that the Referee would consider these findings on September 20, 1956, and that any objection thereto must be filed before that date. On September 18 Mr. Dougherty addressed a letter to the Referee stating that he was engaged in a trial in the Circuit Court in Pendleton and requested that the time for filing objections be set over until Tuesday, September 25. Nothing further was heard from Mr. Dougherty,

so on October 1, 1956, the Referee entered Findings of Fact and Conclusions of Law, and on October 2 entered an order denying and disallowing the chattel mortgage claim of Otto Heider. A copy of the order was immediately mailed to Mr. Dougherty.

Papers Submitted

Transmitted herewith are the following papers:

1. Proof of Secured Debt.
2. Objections to Proof of Debt of Otto W. Heider, filed January 31, 1956.
3. Supplemental Objections to Claim of Otto Heider.
4. Motion to Dismiss, filed by William E. Dougherty, March 14, 1956.
5. Findings of Fact and Conclusions of Law, filed October 1, 1956.
6. Correspondence between counsel and the Referee.
7. Order Denying and Disallowing Chattel Mortgage Claim of Otto W. Heider.
8. Petition for Review, filed by Otto W. Heider, October 10, 1956.
9. Transcript of Proceedings before the Referee on July 6, 1949.
10. Transcript of Proceedings before the Referee on March 14, 1956.
11. Trustee's Summary of Evidence, filed March 27, 1956.
12. Trustee's Memorandum of Authorities, filed March 27, 1956.

13. Trustee's Exhibits 1 to 13, inclusive, introduced at the hearing before the Referee July 6, 1949.

14. Trustee's Exhibits 14 to 18, inclusive, 19 to 29, inclusive, and Exhibit 33.

15. Claimant's Exhibits 20, 30 and 31.

Dated at Portland, Oregon, this 23rd day of October, 1956.

Respectfully submitted,

/s/ ESTES SNEDECOR,

Referee in Bankruptcy.

[Endorsed]: Filed October 23, 1956, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

[Title of District Court and Cause.]

ORDER

This matter having come on to be heard on the petition of Otto W. Heider for a review of the Referee's order entered October 2, 1956, denying and disallowing the chattel mortgage claim of Otto W. Heider; and

It appearing that there is ample support for the findings of fact and conclusions of law dated October 1, 1956, and the Referee's order dated October 2, 1956; and the Court being fully advised in the premises;

It Is Hereby Ordered that the petition for review be denied and the order of the Referee is hereby affirmed.

Dated this 28th day of March, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed March 28, 1957, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Otto W. Heider, a creditor of the bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in this proceeding and dated March 28, 1957, wherein the above-entitled District Court ordered that the petition for review filed by said creditor be denied, and that the order of the Referee thereon be affirmed.

WILLIAM E. DOUGHERTY,
Of Attorneys for Said
Otto W. Heider.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, Otto W. Heider, as principal, and Glens Falls Insurance Company, a New York corporation, as surety, are held and firmly bound unto said S. A. McAllister, Trustee in Bankruptcy for the above-named bankrupt, as obligee, in the sum of Two Hundred Fifty Dollars (\$250), for the payment of which well and truly to be made to the said obligee we do hereby bind ourselves and our respective executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that:

Whereas, said principal has heretofore filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain order entered in the above-entitled proceedings on the 28th day of March, 1957, by the United States District Court for the District of Oregon.

Now, Therefore, if said principal shall prosecute his appeal to effect and pay all costs, if the appeal is dismissed or the judgment affirmed, or pay such costs as said appellate court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, Otto W. Heider, as principal, and said Glens Falls Insurance Company, as

surety, have hereunto set their hands and seals this
3rd day of May, 1957.

/s/ OTTO W. HEIDER,
Creditor and Appellant,
Principal.

[Seal] GLENS FALLS INSURANCE
COMPANY,
A New York Corporation,
Surety;

By /s/ [Indistinguishable],
Attorney.

Countersigned:

JEWETT, BARTON, LEAVY
AND KERN,

By /s/ [Indistinguishable],
Resident Agent.

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Cause.]

ORDER

Upon application of the appellant and good reason appearing therefor, as authorized by Rule 73(g) of the Rules of Civil Procedure, it is hereby

Ordered that the time for filing the record on appeal and docketing the appeal in this matter be, and hereby is, extended to and including July 8, 1957.

Done this 7th day of June, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated that the Court may extend the time for filing the record on appeal and docketing the appeal in this matter to and including July 27, 1957.

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Appellant.

/s/ C. X. BOLLENBACK,
Of Attorneys for Appellee.

[Endorsed]: Filed July 3, 1957.

[Title of District Court and Cause.]

ORDER

Based upon the stipulation filed herein and good reason appearing therefor, as authorized by Rule 73 (g) of the Rules of Civil Procedure, it is hereby

Ordered that the time for filing the record on appeal and docketing the appeal in this matter be, and hereby is, extended to and including July 27, 1957.

Done this 3rd day of July, 1957.

GUS J. SOLOMON,
Judge.

[Endorsed]: Filed July 3, 1957.

[Title of District Court and Cause.]

ORDER

Based on the motion of the appellant, and good reason appearing therefor, it is

Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this Court in regard to the safekeeping and transportation of original documents.

Done this 19th day of July, 1957.

GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed July 19, 1957.

United States District Court, District of Oregon
B-29990

In the Matter of:

RAND TRUCK LINE, INC., an Oregon Corporation,
tion,

Bankrupt.

July 6, 1949—10:00 A.M.

Before: Honorable Estes Snedecor,
Referee in Bankruptcy.

Appearances:

MR. CLARENCE X. BOLLENBECK,
Attorney for Trustee;

MR. S. A. McALLISTER,
Trustee;

MR. MOE M. TONKON,
Attorney for Bankrupt;

MR. BERYL TAYLOR,
Manager, Rand Truck Line, Bankrupt;

MR. OTTO W. HEIDER,
Creditor, in His Own Behalf;

MR. and MRS. VERN MARKEE,
Witnesses;

MR. JOHN HICKSON,
Attorney for Vern Markee.

PROCEEDINGS

Proceedings in re Examination of Otto W. Heider
and Vern Markee:

The Referee: This is the time set for the hearing of the order requiring Otto Heider to assert his claim of lien against certain assets belonging to the bankrupt estate. Mr. Heider has already filed, under date of June 30th, 1949, as required by the order a proof of secured debt in which he states that the bankrupt is indebted to him in the sum of \$11,500, being a balance due on notes and mortgages outstanding and existing on the 7th day of August, 1946. I suppose that means notes and mortgages dated as of that date. And to it is attached a mortgage dated August 7, 1946, made by the Rand Truck Line, an Oregon corporation; Vern Markee and Florence Markee, his wife, as the mortgagors, and H. H. Macy and Vern Markee, Florence Markee and Loren Markee, as mortgagees. Is that right?

Mr. Heider: Yes.

The Referee: This mortgage is given to secure an obligation of \$43,560 and it includes a piece of real estate in Morgan's Addition to the City of Sheridan and certain trucks and trailers and other equipment of the Rand Truck Line, and a long list of furniture, fixtures and equipment belonging to the Rand Truck Line. There is also attached the original note dated August 7th, 1946, executed by Rand Truck Line and Loren E. Markee in which they promise to pay to the order of H. H. Macy, Vern Markee, Florence Markee and Loren Markee

at [2*] McMinnville, Oregon, \$43,560 with interest thereon at the rate of 8 per cent per annum from maturity until paid, payable in monthly installments not less than \$1,000 each, together with full amount of interest due on this note at the time of payment of each installment.

Mr. Heider, this appears to be an executed copy of the mortgage, but it does not have a filing mark on it.

Mr. Heider: I think there is one on file, too, in Multnomah County. They are recorded.

The Referee: In Multnomah County?

Mr. Heider: Yes.

The Referee: It was executed in duplicate?

Mr. Heider: Yes.

Mr. Tonkon: You mean Multnomah County or Yamhill County?

Mr. Heider: Both counties.

The Referee: Now, at the time Mr. Heider sent up this proof of claim he wrote me a letter in which he asked whether it would be necessary for him to appear today in view of the fact that he had filed his proof of claim, and I wrote acknowledging receipt of the claim and of his letter. I said, "The claim is deficient in that you did not include therein an itemized statement of monies disbursed or received by you in connection with any transactions or payments made in connection with said mortgage or the prior mortgage executed September 18, 1944." In that I was following the language [3] of the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

order. I said, "Please bring such a statement with you at the hearing scheduled in my courtroom on Wednesday, July 6, 1949, at 10:00 o'clock a.m. Also bring with you your original record showing receipts and disbursements in connection with the two mortgages. The hearing set for next Wednesday is for the purpose of receiving proof of the balance due on your mortgage and of all transactions in connection with it so that the Court may determine the validity of the mortgage and the amount owing thereon."

Now, you may proceed. I think possibly the best procedure, Mr. Heider would be for you to take the stand and produce the information and let counsel examine you in connection with it, and if you will just bring your briefcase up here and have a chair.

OTTO W. HEIDER

was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

The Referee: Do you have a summary or itemized statement?

A. Well, I brought these vouchers of disbursement on the first mortgage. That is the vouchers made to Mr. and Mrs. Rand. I thought they might want to look them over.

Direct Examination

By Mr. Bollenbeck:

Q. You don't have an itemized statement as suggested by the order? [4] A. That is it.

(Testimony of Otto W. Heider.)

Q. You don't have an itemized statement?

A. Yes, I do have.

Q. Where is it? A. This is it.

Q. Do you have an itemized statement of the receipts of these monies?

A. You mean on the first mortgage?

Q. On both of them.

A. Well, I have—the first mortgage, I gave that back to Mr. Taylor. He has that.

Q. I am asking you about an itemized statement of the payments received and made by you.

A. On the first?

Q. On both of them.

A. You have the first one, the disbursements.

The Referee: Those are disbursements. We want to know what was received.

A. Here is a statement of the receipts on the first mortgage right there.

Q. (By Mr. Bollenbeck): This is your original record? A. Yes; it is my original record.

Mr. Bollenbeck: Will you mark this?

(Document bearing title, "Payments by Mar-kee," so produced, was thereupon marked Trustee's [5] Exhibit 1.)

Q. (By Mr. Bollenbeck): Now, Mr. Heider, without me leafing through all these checks, can you tell me how much you disbursed on the mortgage?

A. \$36,500. That is, you mean on the Rand mortgage, the first mortgage?

Q. The first mortgage.

(Testimony of Otto W. Heider.)

A. I think it is \$36,500. I think that is a pretty close figure.

The Referee: You bought the Rand mortgage, didn't you?

A. Yes; I bought the Rand mortgage from Mr. and Mrs. Rand and Mr. Bollenbeck has it there.

Q. (By Mr. Bollenbeck): When did you buy it?

A. The date of the first check there. You have it there. Well, the date of the mortgage—if you give me the mortgage I can give you the exact date there if you like. I bought the mortgage shortly after this was executed, shortly after September 28, 1944.

Q. Did you prepare that mortgage?

A. Well, I prepared most of it. I think Mr. Rand had some attorney prepare some of it here in Portland, or check it, I don't remember just what.

Q. You prepared it, though, and then it was turned over to Mr. Rand's lawyer and checked?

A. Yes; he checked it. [6]

Mr. Bollenbeck: This is going to be a job, your Honor, checking through these checks, and I hesitate to take the time of the Court to do it at this time. I think that I would like to offer them in evidence as they stand and check them over at a later date.

The Referee: Well, you have some other questions?

Mr. Bollenbeck: Yes; I do, your Honor.

A. I think, Mr. Bollenbeck, there is a slip there attached to them.

Mr. Bollenbeck: Let me put them in evidence.

(Testimony of Otto W. Heider.)

(Sheaf of checks, so produced, was thereupon marked Trustee's Exhibit 2.)

The Referee: Does Exhibit 2 represent your checks, what you paid out for the mortgage?

A. What I paid out to the Rands for the mortgage. I think they are all there, although I am not certain.

The Referee: What is the amount you paid?

A. I think it is \$36,500, although I am not sure that is exactly accurate, but I think it is very substantially so, but I had difficulty in finding some of those old cancelled checks. It is five years old.

The Referee: Well, do you remember what your agreement was when you bought it?

A. Remember what?

The Referee: How much did you agreed to pay for it? [7]

A. That was it; that was correct.

The Referee: \$36,500?

A. \$36,500.

Q. (By Mr. Bollenbeck): Mr. Heider, don't you have a ledger sheet on a transaction of this size?

A. This is what I kept on this.

Q. This yellow sheet, Exhibit 1?

A. That was the original record. That was the original record, that is what you asked for.

Q. You didn't enter the payments into a cash book or anything else when you received them?

A. I didn't have a cash book. That was my record right there.

(Testimony of Otto W. Heider.)

Q. You didn't have any ledger to show the amount due on the mortgage?

A. A ledger to show the amount due—yes; that shows the amount due all the time right from the beginning.

Q. In other words, this yellow sheet, Trustee's Exhibit 1, is your sole and only record of this transaction, is that right?

A. That is my original record.

Q. What other records do you have?

A. I don't have any other with me, but that is what you asked for, my original record.

Q. What other records do you have?

A. Well, I have the cancelled checks. I gave them to you and you introduced them in evidence. [8]

Q. Yes. And what other records do you have?

A. I don't know that I have any others.

Q. No records at all?

A. Yes. I have the mortgage and I gave it to Mr. Taylor, and I gave the checks to you and you introduced them in evidence.

Q. Do you have any other records?

A. Not that I know of.

Q. Well, you would know of any others you have?

A. Well, I have some copies here of some checks, but those are not signed. Those are not originals. You asked for originals.

Q. Do you have any sort of a ledger sheet you carried on this transaction?

A. No ledger sheet. That is the transaction. Here

(Testimony of Otto W. Heider.)

is some copies. I don't think they would be of any value. They are not signed.

Q. Well, now, Mr. Heider, you knew when this first mortgage was prepared that you were going to end up owning it, didn't you?

A. No, I didn't know it at all; didn't know it at all.

Q. You didn't have any idea that you might be buying it?

A. I didn't know. Rand told me that he might want to sell it.

Q. Were you attorney for Rand?

A. No; I wasn't.

Q. Were you attorney for Markee? [9]

A. No; I wasn't.

Q. Then why does it happen that this mortgage provides that all insurance policies now on file with the Public Utilities Commissioner of the State of Oregon shall be left in the safekeeping of Otto W. Heider of Sheridan, Oregon?

A. You say why would they be left there?

Q. Yes. A. Well, I had a safe in my office.

Q. You didn't have any idea of buying this?

A. We hadn't made any deal on it yet; we hadn't closed up any deal on it.

Q. Before it was executed?

A. No, no. You mean I bought it before it was executed?

Q. Yes. A. No.

Q. Why was this inserted in here then, why was this provision in the mortgage?

(Testimony of Otto W. Heider.)

A. In the mortgage?

Q. Yes.

A. Well, I had probably been looking after it for Mr. Rand. He didn't hire me though but I probably was——

Q. How did it happen it was prepared in your office?

A. Oh, I was doing some work in my office and the parties were there and it was convenient. Mr. Rand was in town every week and it was a convenient location. [10]

Q. You didn't represent him as his lawyer?

A. I don't think Mr. Rand ever paid me a dollar attorney's fees.

Q. And you didn't represent Markees?

A. Oh, the Markees have had some legal work off and on, small amounts at different times, that I have done for them.

Q. Well, whom did you represent when you prepared this mortgage?

A. Well, I represented Mr. Rand.

The Referee: Did you represent the truck line?

A. No; I didn't. He had a firm of attorneys here in Portland, and I can't tell you who they were.

Q. (By Mr. Bollenbeck): Did you prepare the minutes of the meeting?

A. No; they had—I think Mr. Rand or Mrs.—they had somebody to keep the minutes of the meeting. I think I did type up some minutes of the meeting.

Q. You didn't type them up?

(Testimony of Otto W. Heider.)

A. Oh, I think some part of the minutes, not all of them.

Q. You didn't represent yourself in this transaction when you were preparing this mortgage?

A. Well, if I did anything, I didn't ignore myself, that is for sure.

Q. And you knew you were going to buy it?

A. Well, we talked about it, but we hadn't come to any meeting of minds. We had discussed it, that is right, we had discussed [11] it.

Q. Who computed the amount of interest and arrived at this figure of \$43,560?

A. Well, I imagine all parties involved did.

Q. Including yourself?

A. Well, I was there. I think all parties involved had a hand in it.

Q. Now, Mr. Heider——

(Promissory note, dated September 28, 1944, payable to Mrs. R. R. Rand and signed by Vern Markee, Loren E. Markee and Florence Markee, so produced, was thereupon marked Trustee's Exhibit 3.)

Q. (By Mr. Bollenbeck): Did you buy this mortgage at——

A. The interest was figured in and I bought it at a discount of the interest.

Q. You say you paid \$36,500 for it?

A. Yes; approximately right.

Q. And is that what the Rands were selling their stock to the Markees for?

(Testimony of Otto W. Heider.)

A. Oh, I don't know what they sold the stock to Markee for.

Q. What was the consideration for this mortgage?

A. Well, I just give you the cancelled checks a little bit ago.

Q. I know. Between the Rands and the Markees what was the consideration for the mortgage? [12]

A. They made their own deal. You would have to see Mr. Rand and Mr. Markee. You mean what the total sales price of the truck line was? I can't tell you that.

The Referee: Well, was this mortgage, did it represent all or part of the purchase price?

A. I understood it represented part, not all, of the purchase price. Now, as near as I can answer your question, is that I understood the sales price was somewhere between fifty and sixty thousand, the original sales price. As to that, I don't know, but that is my impression of the whole thing. What the original sales price and what that was, I can't give you that. I can't remember. It might have been discussed five years ago in my presence, but just what those figures are, I don't know.

Q. (By Mr. Bollenbeck): I will hand you Trustee's Exhibit 3 for identification, which is the original note signed by Vern Markee and Florence Markee and endorsed by Mrs. R. R. Rand without recourse or liability, and ask you why that kind of an endorsement was put on there?

A. You would have to see Mrs. Rand about that

(Testimony of Otto W. Heider.)

because I imagine that is the way she wanted it. Why she put it on there you would have to consult her.

Q. Why did you accept it that way?

A. Why did I have to accept it any particular way?

Q. Why did you accept it that way? [13]

A. Well, what way did you want me to accept it?

Q. I mean, if this was a bona fide sale of this mortgage after it was executed, why did you accept that kind of an endorsement?

A. Well, I have accepted those kinds of endorsement lots of times. Why shouldn't I?

Q. Why did you?

A. Because I accepted it.

Q. As a matter of fact, Mr. Heider, you knew you were going to finance this mortgage before it was executed?

A. No; I didn't know anything about it. I knew we talked about it but I couldn't guarantee I was going to buy it; I couldn't guarantee it at all.

Q. Who is Irene Lawrence?

A. She is a stenographer in my office.

Q. She notarized this mortgage?

A. Yes; she did; that is her signature.

Q. The mortgage is dated September 28, 1944. Now, when did you—when was it assigned to you?

A. Well, you must have the assignment there. If you will hand it to me I will read the date for you.

Q. I have an assignment of the second mortgage but not of the first.

(Testimony of Otto W. Heider.)

A. Well, I think Mr. Taylor got it all together so it must be over in his office. [14]

Q. Well, considering the date of execution of September 28, 1944, when was it assigned to you?

A. Well, the assignment will speak for it on it. I can't tell you because I think Mr. Taylor got it with the mortgage and you will have to get it from him.

Q. Did you record the assignment?

A. I don't remember whether the assignment was recorded or not. My impression was that it was not recorded, although I wouldn't be sure.

Q. How long before you made your first payment to the Rands was the assignment taken?

A. Well, from the cancelled checks——

Q. Just answer the question.

A. Oh, I don't remember five years ago. I can't remember, nor neither would you.

Q. Was the assignment made simultaneous with the first payment?

A. I don't recall. If you got the assignment I can tell you; if you will produce the assignment, and that will refresh my memory five years back, but I can't do the impossible.

Q. You have the assignment as far as I know.

A. No; I haven't got it. Mr. Taylor has.

Q. When did you decide to buy this mortgage?

A. Shortly after it was executed. That is what I told you.

Q. How shortly after?

(Testimony of Otto W. Heider.)

A. I don't know. I can't give you the hour or day. [15]

Q. Was it within twenty-four hours?

A. I wouldn't say. It might have been forty-eight hours.

Q. Might have been forty-eight hours?

A. Might have been a week or two weeks, but I think the assignment will show pretty well. That is perhaps a copy of the assignment you have there.

Q. That is the second mortgage.

A. If you will show me the date of the first check there——

Q. I just want you to fix the date of the assignment without seeing the first check.

A. I can't fix the date five years. Can you remember any transaction that happened in your office, the date and hour, five years ago?

Q. Well, if it involved \$43,500 of my money I would.

A. Well, you are a lot smarter than I am; I will give you credit for that.

Q. Now, Mr. Heider, you knew what this transaction involved, that it was at least part payment of the stock of the Rand Truck Line?

A. Oh, I realized it was payment of most of the tangible assets of the Rand Truck Line. That was my understanding.

Q. Well, that was symbolized by a sale of the stock, wasn't it? The assets themselves were not sold to anybody?

A. Yes; I suppose symbolized by the stock.

(Testimony of Otto W. Heider.)

Q. So it was a sale of the capital stock of the Rand Truck [16] Line?

A. Yes. I understand Mr. Rand parted with all his interest in the Rand Truck Line. I understood he was entirely out.

Q. And did you take the capital stock as additional stock for security of this mortgage?

A. I think I had the original stock, and I have the new stock now. Now, the original stock—I can't tell you where that is. I think that was returned, most of it, to Mr. Taylor and the different ones, the different parties, and then was taken up by the new stock. Now, I can't tell you what parties got that stock but there was four or five different ones that got the old original stock, but I have the new stock here with me today.

Q. Now, you knew that this money that was being paid out to the Rands on this mortgage and would be repaid to you by the corporation?

A. Yes, by the corporation.

Q. That it was in payment of a debt that the corporation didn't owe?

A. It was payment of a debt the corporation didn't owe?

Q. Yes.

A. Well, of course, I understood it was a debt the corporation did owe, so I was——

Q. Well, you knew it was part of the purchase price of the sale of this stock, didn't you? You stated that. [17]

(Testimony of Otto W. Heider.)

A. Well, it was of all the tangible assets of the corporation. I knew that.

Q. Now, Mr. Heider, you are a lawyer and you know there is a lot of difference between the sale of the assets of the corporation and the sale of the capital stock.

A. I don't practice law enough—you do all the time, you are in court probably ten times as much as I am, but I don't practice in court enough to—to sell the tangible assets and the stock, it means the same thing to me, because you are passing over all the tangible assets when you sell. It means the same thing to me.

Q. You know the physical assets of this corporation did not change hands as a result of this transaction, they were still owned by the Rand Truck Line, weren't they?

A. The management and personnel and all changed hands.

Q. The tangible assets were still owned by the same corporation that owned them prior to this transaction, weren't they?

A. There was a change made in the corporation there and I can't tell you what that was. There was a change made in the corporation at that time.

Q. Now, just answer my question.

A. Well, the business continued as before.

Q. Yes.

A. Yes, that is right. The same assets were operated, the same rolling stock. [18]

(Testimony of Otto W. Heider.)

Q. There was no transfer of title of the tangible assets of the Rand Truck Line, was there?

A. Well, I think there was. I think the certificates of title were transferred.

Q. To whom?

A. They were transferred on the records of the Secretary of State's office.

Q. To whom? A. To the Rand Truck Line.

Q. Who had owned them prior to that time?

A. Some of the titles were in Rand's name individually, R. R. Rand, and they were transferred over to the Rand Truck Line.

Q. Was that part of the consideration for this transaction?

A. Well, it was handled all substantially at the same time so I suppose it was part of the whole transaction, yes.

Q. And how many years have you practiced law, Mr. Heider? A. Thirty-five.

Q. And you are sitting up there and telling me that that is what your conception of this transaction is?

A. Yes. When you transfer all the stock it amounts to the same thing as transferring all the assets of any corporation. Yes. That is my idea of it, that you can't sell the assets to one person and stock to another person of any corporation, you can't split up that way; it won't work.

Q. Now, Mr. Heider, can you tell us from whom these payments [19] were received?

A. Well, they were received from the Rand

(Testimony of Otto W. Heider.)

Truck Line, from the earnings of the Rand Truck Line, that is right.

Q. Do you know whether any of the officers or directors of the Rand Truck Line had any outside income?

A. Mr. Macy over there, or whether Loren Markee had any outside income, I don't know. Whether they had any other business, I don't know.

Q. Well, you stated emphatically it came from the earnings of the Rand Truck Line.

A. And so far as I knew, that was my information.

Q. You don't know who paid them to you?

A. Oh, whoever happened to be the manager at the time. Mr. Taylor paid—I don't know whether he was the manager—I don't think he was in the beginning, but when he became manager he paid the payment and prior to that time whoever was in charge paid them.

Q. Now, can you tell me from this Trustee's Exhibit 1 what the balance was at the time of refinancing?

A. \$13,168.

Q. All right; now, let's get down to the second transaction. Have you got the original of the second mortgage?

A. Well, I think the Court—yes—has it there. I have a substantial copy of it.

Q. Now, what disbursements did you make when you took the [20] second mortgage?

A. Well, here is the cancelled vouchers right

(Testimony of Otto W. Heider.)

here. That was a certified check. There you are. You better put this with it.

Q. \$13,168?

A. I believe that is correct. I think you have an adding machine tape there on it, the same figure.

Q. You have handed me a First National Bank of Sheridan, Oregon, statement dated August 7, 1946, representing the certified check to Rand Truck Line for \$5,000.

A. That is right.

Q. Also a check dated August 7, 1946, to the Rand Truck Line, Inc., and Transport Bodies & Equipment Company for \$3,000, a check, the Rand Truck Line, dated August 7, 1946, for \$5,000, and a check to the Rand Truck Line for \$4,508 dated August 14, 1946. Now, that, those total, those four items total \$17,508, and you have a balance of \$13,168. That is a total of \$30,706, according to my computations. Now, how did you arrive at the rest of the balance of this \$43,560 on the second mortgage?

A. I think you made a mistake in your computation. Yes, you have.

Q. I will be glad——

A. You add it again and you will find your total is \$36,027.

Q. I noticed on your adding machine data you have more than four items and now you have only delivered the evidence of four of them. [21]

A. I don't know what item—you got the items there. This is one of the items right here, and this one here, and there they are, that makes the correct amount.

(Testimony of Otto W. Heider.)

Q. Now, in addition to these four checks that you have submitted to me you have submitted a chattel mortgage payable to Earl Walden or Otto W. Heider upon certain equipment with the principal of \$1,080.

A. That was taken up at the time of the second mortgage.

Q. Who is Earl Walden?

A. Earl Walden?

Q. Yes. A. I don't know him.

Q. You don't know him?

A. Earl Walden?

Q. Walden (spelling), W-a-l-d-e-n.

A. I think he might be an employee of Rand Truck Line.

Q. Why was the mortgage made payable to him or to you?

A. Well, that was to either one of us.

Q. Why? A. Why not?

Q. Just answer the question without arguing with me. You are a witness here today, not a counsel.

A. I guess the mortgage can be drawn any way you want to draw it.

Q. Why was it drawn that way?

A. I don't know except that it was drawn that way. [22]

Q. Who drew it?

A. Hand me the mortgage. Maybe I can tell you. Earl Walden. I think he was an employee of the truck line. The note is just Earl Walden. Earl

(Testimony of Otto W. Heider.)

Walden is not named in the mortgage—or—I am not named in the note.

Q. Now, was that mortgage drafted in that fashion?

A. It subsequently was transferred to me, or I took it at the time.

Q. Well, did you advance any money on it?

A. Why, I did advance money on it.

Q. I mean when it was originally executed?

A. Well, now, on the date of my advance I can't tell you, but I did some time in the month of July, 1946——

Q. Prior to the time it was included in this second mortgage? A. Yes; that is right.

Q. How much money did you advance on it?

A. Oh, I think \$1,050, \$1,050.

Q. To whom did you advance it?

A. I think Rand Truck Line.

Q. Do you have the voucher on that?

A. No; I couldn't find the voucher on that; I don't have——

Q. You don't have that cancelled check?

A. No; I don't have that cancelled check with me.

Q. Do you have it at Sheridan?

A. I don't know. I couldn't find it when I went through my [23] files yesterday.

Q. Who arranged for this mortgage for the Rand Truck Line?

A. Well, H. H. Macy, general manager at the time.

(Testimony of Otto W. Heider.)

Q. Do you remember that is who it was or is that what you are taking from the document?

A. That is Mr. Macy's signature. I think I am familiar enough with his signature to know that is it.

Q. He came to your office and wanted to arrange the loan?

A. I think that is right.

Q. And your office prepared this mortgage, didn't it?

A. I think it did.

Q. Miss Lawrence is on as Notary Public?

A. Yes.

Q. Now, why was the note and mortgage taken in the name of Earl Walden?

A. Well, Earl Walden had something to do with it, and I can't tell you just what he had to do with it at the time. I didn't know Earl Walden too well. I think I had met him, and just who he is I can't tell you at the moment.

Q. On these mortgages with prepaid interest, what interest did you compute that prepayment at?

A. Oh, the interest I think was computed on the basis of 10 per cent per annum compounded semi-annually.

Q. 10 per cent per annum compounded semi-annually?

A. Yes. [24]

Q. This is a mortgage dated July 7, 1946.

Mr. Tonkon: Not the basic mortgage.

Q. (By Mr. Bollenbeck): The same interest rate?

A. Yes.

Mr. Tonkon: But the interest was included in the outset in the basic mortgage, that is my point.

(Testimony of Otto W. Heider.)

Mr. Bollenbeck: Yes, only after maturity.

Q. Now, Mr. Heider, I am going to hand you a note and mortgage given apparently by the Rand Truck Line, rather to Rand Truck Line by Vern Markee and ask you to explain that mortgage.

A. Oh, that was a mortgage that was taken up at this—this is a mortgage that was taken up in that second mortgage you mentioned.

Q. Now, how did you happen to get that mortgage?

A. I suppose it was left with me when that second transaction was taken care of, when that second mortgage was made.

Q. Do you mean in that second mortgage that you bought that mortgage off of Vern Markee?

A. This balance was deducted out on that second mortgage, that is right.

Q. Now, let me get this straight. This is a mortgage that Vern Markee gave to the Rand Truck Line, right?

A. Yes; individually; he executed it individually.

Q. And then did you buy this mortgage from the Rand Truck Line?

A. I bought the mortgage. [25]

Q. When?

A. Well, shortly after its execution.

Q. Well, now, how shortly after its execution? It was executed in your office.

A. Oh, I suppose two or three days.

Q. As a matter of fact, it was simultaneous, wasn't it?

A. Well, very shortly afterwards.

(Testimony of Otto W. Heider.)

Q. That was done with the intention of you buying that mortgage?

A. Well, you mean that I give him the money with the intention of passing it to him?

Q. You knew you were going to pay out the money at the time you executed the mortgage?

A. Yes; on that mortgage I am sure I did.

Q. And how much did you pay for that?

A. Oh, I think about \$5,100.

Q. Did you have the cancelled vouchers for that?

A. No; I didn't find the cancelled voucher for that.

Q. Do you keep all your cancelled checks in one place?

A. No—well, I keep them in the back room in files. That had a balance on—that one at the time the second mortgage was written—I think it is written on the note there.

Q. You mean you lost your October, '45, and November, '45, cancelled vouchers?

A. Well, I don't think they are lost; I think they are misplaced. I am not sure that they are lost. [26]

Q. Do you remember exactly how much money you paid Rand Truck Line for this mortgage in the beginning? A. I don't remember exactly.

Q. How was it paid? Was it paid in cash?

A. Cash and check.

Q. Well, now, do you mean you paid some of it in currency?

(Testimony of Otto W. Heider.)

A. Some of it in currency and some of it by check.

Q. Do you ordinarily do business with currency?

A. Oh, I do quite frequently where I have something to show for it.

Q. And then we have here, Mr. Heider, a conditional sales contract whereby the Rand Truck Line has purchased from you—wait a minute.

A. You are mistaken.

Q. Let me get this straight. This conditional sales contract, dated April 9, 1946, wasn't the Rand Truck Line buying that Fruehauf truck from you, or semi-trailer?

A. Yes; they were buying this from me. There is a balance on this one. You have it here.

Q. What is the balance on this?

A. \$1,721. That is on the 7th day of August, 1946.

Q. And that was at the time the second mortgage was made?

A. Yes; that is the time the second mortgage was made.

Q. Now, referring back again to this Vern Markee note and mortgage to the Rand Truck Line that you bought from the Rand [27] Truck Line, apparently that shows a balance of \$2,550 as of the date of the second mortgage.

A. Yes, that is right. And this shows a balance as of that date of \$1,721.

Q. And this Earl Walden note and mortgage,

(Testimony of Otto W. Heider.)

what was the balance on that at the time of the second mortgage?

A. Well, I guess there had been nothing paid on that, no part paid on that.

Q. And you figured that in at \$1,080?

A. I think it is on the slip there. You have it.

Q. For \$1,080 on your slip when you wrote the second mortgage, is that right?

A. If you will hand me the slip. That is right.

Q. Now, these items that we have been referring to, this certified check slip for \$5,000, this check to Rand Truck Line and Transport Bodies for \$3,000, the check to Rand Truck Line for \$5,000 and the check for Rand Truck Line for \$4,508, and \$1,080 on the Earl Walden note and mortgage, \$2,550 on the Vern Markee note and mortgage, and \$1,721 on the conditional sales contract, that is what was taken up in the second mortgage?

A. Yes; that is right.

Q. How did you happen to buy this or sell this Fruehauf trailer to Rand Truck Line?

A. You mean why did I sell it?

Q. Where did you get it before you sold it to them? [28]

A. I can't tell you where it came from.

Q. Was it Rand Truck Line's equipment?

A. Well, I don't know whether it was Rand Truck Line equipment or not. I'd have to trace the ownership of that, that is the prior ownership, through the Secretary of State's office, which could be done very well. Whether I bought it direct from

(Testimony of Otto W. Heider.)

Fruehauf or not, I couldn't tell you about that. It is possible that I did. It is in '45 so I might have bought it from Fruehauf.

Mr. Bollenbeck: I would like to offer these documents in evidence, your Honor.

The Referee: Put them all together with the adding machine tape and we will offer them as one exhibit.

(Mortgage dated July 11, 1946, and accompanying papers, so produced, were thereupon marked Trustee's Exhibit 4.)

Q. (By Mr. Bollenbeck): Now, Mr. Heider, you show a balance of \$36,027 as being these items to which we have just referred. The second mortgage is \$43,560, is that right? A. That is right.

Q. What is the difference, what represents the difference between those two figures?

A. The interest.

Q. Now computed at what rate?

A. At 10 per cent compounded [29] semi-annually.

Q. Now, among these items that you have stated is included this Earl Walden note dated July 11, 1946, in the amount of \$1,080, is that right?

A. Yes; that is included in the second mortgage.

Q. And that mortgage is dated July 11th, 1946, about 28 days prior to the execution of the second mortgage, is that right?

A. Yes; something like that.

(Testimony of Otto W. Heider.)

Q. And that Earl Walden mortgage provides for payments over a period of one year, is that right?

A. That is right.

Q. And in this \$1,080 that you have made this note for, it includes prepaid interest for the year?

A. That is right.

Q. Now, this Vern Markee mortgage is dated October 31, 1945, is that right, and there is a balance on it at the time of the second mortgage of \$2,550, is that right?

A. I think so, yes, a balance on it on August 7th, 1946—that is about a year after its execution—that is right.

Q. And that mortgage, note and mortgage, also provides that it shall run a year?

A. It did run a year, about.

Q. It provides for payment thereof in monthly installments? A. That is right.

Q. And twelve monthly installments. And interest was computed in advance on that note and mortgage, too, was it not? [30]

A. I think so.

Q. And that the yearly period had not run on that note and mortgage before it was incorporated in this mortgage of August 7th had it either?

A. Almost.

Q. Not quite?

A. But there were a lot of delinquent payments from overdue interest on it. There was overdue interest on delinquent installments.

Q. Just a minute, Mr. Heider. From August 7,

(Testimony of Otto W. Heider.)

1946, to October 31, 1946, that period of the mortgage had not run yet?

A. No, that two months had not run.

Q. Now, Mr. Heider, when you took this second mortgage, at that time did Vern Markee owe you any money personally?

A. Oh, at that time I don't recall whether he did or not. He might have owed me some.

Q. Did you hold a mortgage on any of his property at that time?

A. Well, now, he might have—I did sell him and Mrs. Markee a house but what date I sold it to them—where they now live—I don't remember the date of that. They still owe me some on their residence yet, and I can't tell you the date of sale of the house, and if the date of sale of that house was prior to August 7th they did owe me on the house.

Q. Well, now, how much did you sell them the house for?

A. I think it was \$8500 or \$9000. [31]

Q. Well, Mr. Heider, don't you know?

A. Do you know every transaction you transacted in your office in the last three years? You don't know and you know you don't. Do you keep every item that you transacted in your office in your mind?

Q. Wasn't this formerly your home?

A. Yes, I lived there, but I didn't move the home away from there where it was located.

Q. Don't you remember what you sold your home for?

A. Well, I think it was \$8500 or \$9000, I

(Testimony of Otto W. Heider.)

wouldn't say which. I don't carry all those things in my mind and I don't think you do either. It don't make sense.

Q. How much is due and owing on that home now? A. Well, I can tell you approximately.

Q. All right, tell me approximately.

A. I think about \$6000, although I am not just sure. That is very close, though.

Q. Is that in the form of a conditional sales contract or mortgage?

A. Conditional sales contract.

Q. Conditional sales contract?

A. I think that is right.

Q. Are the payments being made promptly?

A. Yes, very good, no objection at all.

Q. Did you ever receive any checks from Rand Truck Line in [32] payment of that house?

A. No, I think Mr. Markee made them all individually, I am sure he did.

Q. Now, what is the legal description of that house, do you know what addition it is in?

A. Yes, it is in Block 11, Falkner's Addition, Sheridan. That description is by metes and bounds because it is a block divided up by metes and bounds and isn't platted off into lots. It is right across from the Catholic Church in Sheridan, across the street.

Q. Now, Mr. Heider, when you executed this second mortgage, in addition—first of all, let me ask you this: Did you prepare this second mortgage in your office?

(Testimony of Otto W. Heider.)

A. I think it was prepared in my office.

Q. Will you tell me why the mortgage was executed in the form it is in that it wasn't a direct mortgage from the Rand Truck Line to you?

A. Well, one of the reasons on that—for the same reason the banks execute the mortgage in the same manner so there is individual liability there. The banks, U.S. and First National both are using the same form, to get individual liability. I take it that is the reason.

Q. Is that why the original mortgage was made to Mrs. R. R. Rand?

A. Oh, Mr. and Mrs. Rand were the original owners.

Q. But, I know—— [33]

A. There was no—I don't think when they sold there was any outside stockholders.

Q. Is that why the original mortgage that you held was made payable to the Rands instead of to you?

A. They were the sellers.

Q. Why did you prepare the original mortgage to Rands instead of to you?

A. That is the way they wanted it prepared.

Q. But this second mortgage was executed to the Macys and Markees by the Company and then transferred to you so that you would have the individual liability of the stockholders, is that right?

A. Yes, they were the principal stockholders at that time, all of them, or, in fact, I think they were the only stockholders.

(Testimony of Otto W. Heider.)

Q. Why did you include this property in Morgan's Addition?

A. Well, that was where the terminal was located, if I recall.

Q. Whose terminal?

A. Well, Mr. Markee's terminal. That terminal never was owned by the Rand Truck Line.

Q. Is that Markee's terminal?

A. It is Markee's individual terminal.

Q. Markee was mortgaging his terminal to himself and you were buying the mortgage, is that the way it worked out?

A. He and his wife signed the mortgage.

Q. To himself? [34]

A. Well, there were other signers with him, there were other signers on the mortgage, instead of making a separate mortgage they all signed on the same mortgage.

Q. Now, why did you include that terminal?

A. It was included as additional security.

Q. Did Markee owe you any money on that terminal prior to that time?

A. I think not.

Q. Did you ever have a mortgage to the terminal?

A. No, I never had a mortgage on it. Mrs. Haas at Sheridan had a mortgage.

Q. Did you pay that mortgage off for Mr. Markee?

A. No, I think Mr. Markee paid it off himself.

Q. Was it paid off before or after this second mortgage was executed?

(Testimony of Otto W. Heider.)

A. Now, as to date of payment—Mrs. Haas advanced the money to Mr. Markee to build it personally. I know about the transaction, but I can't tell you what date it was paid off, whether it was before or after, but I think he paid it off by the month.

The Referee: We will recess for five minutes.

(Short recess.)

Q. (By Mr. Bollenbeck): Now, Mr. Heider, you stated that you had never had anything to do with the business affairs of the Rand Truck Line, is that right? [35]

A. Oh, I never was their attorney. They had attorneys here in Portland. I don't know who they were, but they had, I think had, attorneys on a retainer by the year.

Q. Did you ever have their minute book, keep the minute book or by-laws in your possession?

A. Oh, I did some notary work for them, some odd jobs.

Q. I am not talking about notary work, I am talking about keeping the corporation records.

A. Oh, I never kept the corporate records.

Q. Never kept the corporate records?

A. No.

(Letter to Rand Truck Line by Otto W. Heider dated November 28, 1947, so produced, was thereupon marked Trustee's Exhibit 5.)

(Testimony of Otto W. Heider.)

Q. (By Mr. Bollenbeck): May I hand you Trustee's Exhibit 5 and ask if that is your signature?

A. I never kept them, I just sent these to Rand Truck Line.

Q. Just answer the question. Is that your signature?

A. Yes, that is my signature, but I never made up the by-laws or corporate records.

Q. How did you happen to have a copy of the by-laws?

A. I think they were left there by Mr. Rand for safekeeping, that is how I happened to have them. I never made them up at all.

Q. You mean this is a copy of the by-laws Mr. Rand left in [36] your office?

A. Just with some other old books and seal and other old books of the company, left them there temporarily.

Q. How did you happen to have the seal?

A. Well, I think he had it there at the time he put the seal on the mortgage.

Q. And left it there?

A. Left it there for awhile. I think they subsequently came and got it, but I never had charge of those things, just temporarily, just a temporary arrangement.

Q. How temporary, how long were they there?

A. He came back to town once a month when he was closing up his accounts with the different shippers and things and he would stop in and sometimes he would pick up one thing and sometimes another.

(Testimony of Otto W. Heider.)

Q. But he didn't pick up the by-laws?

A. I think that was an unsigned copy of the by-laws. I don't think—I am not sure. Mr. Taylor should have them. I never did write the by-laws for Rand Truck Line.

The Referee: Or the minutes of any of their meetings?

A. No, they usually had someone keep the minutes of their meetings. We might have typed them up in our office.

Q. (By Mr. Bollenbeck): Well, who dictated them?

A. I don't know who dictated them. I didn't dictate them.

Q. You never dictated any of the corporate minutes? [37]

A. I never kept the corporate records at all or prepared any of them.

Q. Just answer the question. Did you ever dictate any of the corporate minutes?

A. Well, I might have dictated on one or two occasions a small portion of the corporate minutes.

Q. Those occasions might be the occasions when these mortgages were given, mightn't they?

A. I don't know about that.

Q. You would be vitally interested in that part of the corporate minutes, wouldn't you, Mr. Heider?

A. Oh, I don't know necessarily why.

Q. Just answer the question. Would you or wouldn't you?

(Testimony of Otto W. Heider.)

A. Well, no. I had ample security. I had ample collateral all the time.

Q. Do you have the certificates of title of the motor vehicles there? A. Yes.

Q. May I see them, please. Do you have the ICC and PUC certificates?

A. Oh, no, I don't have them, never did have them.

Q. Now, there is one thing I can't understand about these mortgages, Mr. Heider, this Vern Markee mortgage, the original mortgage of \$5400 payable to the Rand Truck Line.

A. That was taken up by the second [38] mortgage.

Q. Well, now, let's get to that step by degrees.

A. All right.

Q. They executed—rather, Vern Markee gave the Rand Truck Line this mortgage dated October 31, 1945, on a Sterling truck, is that right?

A. Well, the description states there—

Q. One Sterling truck, model engine 44. Now, what happened to that mortgage then as far as you know? A. Why, it was filed, I suppose.

Q. Well, I mean did the Rand Truck Lines sell it to you?

A. I think that they sold it to me along with their other security.

Q. Well, when we were talking about this awhile back you stated that they had sold it to you, if I remember rightly. A. The Rand Truck Line?

Q. Yes. A. Had assigned it to me.

(Testimony of Otto W. Heider.)

Q. Well, they assigned it to you? A. Yes.

Q. And at that time you didn't know how much you had paid for it?

A. Oh, I told you I thought it was \$5100—I can't tell exactly. It was \$5100, between \$5100 and \$5200, and some cash.

Q. How much?

A. I'd say between \$5100 and \$5200. [39]

Q. And you stated you couldn't find the cancelled check?

A. I didn't find it yesterday when I was going through.

Q. Now, did you find the checks for the month of November, 1945? A. For what?

Q. For the month of November, 1945.

A. On what transaction?

Q. Well, your checks for November.

A. For what—oh, the checks to Rand—you have them in your hand.

Q. Well, there are some of those checks issued during the same month that this transaction occurred. Now, how did you happen to find these checks and not the check involved in this transaction?

A. I think probably with additional search I can probably find the checks.

Q. Do you keep your checks for one month together? A. No, I don't.

Q. What kind of a filing system do you have?

A. We usually keep them for two or three months together.

(Testimony of Otto W. Heider.)

Q. All right, you keep them for two or three months together and you found that particular batch of checks because you delivered the Rand checks. Why is it you couldn't find this check?

A. Why, I probably could find the checks. [40]

Q. Did you make an effort to find them?

A. Yes, I made an effort to find them and probably could find them.

The Referee: Well, without going into that detail, why, we will ask that if he can produce the check by which he purchased the Vern Markee mortgage——

A. Yes, I have a notation of date there and I can make another search, if the Court please.

Q. (By Mr. Bollenbeck): Also the Earl Walden mortgage, and if he can't find the checks, to produce the bank statements.

A. The bank statements wouldn't show the names of the payees.

The Referee: Well, still on this particular mortgage, you bought it from Rand Truck Line. Rand Truck Company didn't owe you any money on that?

A. You mean the first mortgage?

The Referee: No. I am talking about this Vern Markee mortgage.

A. Oh, yes—oh, this last mortgage.

The Referee: The Vern Markee mortgage.

A. They didn't owe me anything on that. I just paid them cash out on that.

The Referee: Yes, but then when you made this

(Testimony of Otto W. Heider.)

refinancing, why, you charged the Rand Truck Company for the balance due on that mortgage, \$2550.

A. Yes. [41]

The Referee: Well, did they owe you that?

A. Yes, they did.

The Referee: I thought Vern Markee would owe it to you.

A. Well, it is Rand—let me see the mortgage. Well, it was all in the same transaction. It was all taken up. This mortgage was given by Vern Markee, was given for the benefit—it was made out to the Rand Truck Line and made for the benefit of the Rand Truck Line. They got the proceeds out of the mortgage.

The Referee: And then you bought it from the Rand Truck Line?

A. Yes, I bought it from the Rand Truck Line.

The Referee: And did they endorse it without recourse?

A. No, they endorsed it with recourse.

The Referee: So you looked to them for the repayment of that mortgage?

A. Not now, because it was taken up.

The Referee: But at that time? A. Yes.

The Referee: And who was paying for that?

A. Who was making the payments?

The Referee: Yes.

A. The Rand Truck Line.

The Referee: Even though it was executed by Vern Markee to the Rand Truck? [42]

A. Yes, because he was one of the principal offi-

(Testimony of Otto W. Heider.)

cers of the Rand Truck Line and the money that was represented by this mortgage went for the benefit and use of the Rand Truck Line, that is right.

The Referee: The Rand Truck Line was operating this piece of equipment? A. Yes, it was.

The Referee: Not Vern Markee?

A. Well, Vern Markee was one of the operators of it for the Rand Truck Line, that is right, but the money represented by the mortgage went into the Rand Truck Line, to the benefit of the Rand Truck Line.

Q. (By Mr. Bollenbeck): Now, Mr. Heider, did you state this first mortgage was prepared in your office? A. Yes, I think it substantially was.

Q. I mean, it was typed in your office?

A. Yes, it was typed in my office and then checked by Rand.

Q. Now, do you know whether the minutes of the meeting authorizing this particular mortgage were typed in your office?

A. Let me see the minutes. I can't tell.

Q. The minutes of September 28, 1944, referring particularly to the second page thereof where it says "It is moved and seconded that the President and Secretary of the Rand Truck Line, Inc., together with the Vice President, borrow from Callie B. Heider on assignment from Mrs. R. R. Rand the sum of \$43,560." [43] Now, was that prepared in your office?

A. Well, that is the 28th day of September, '44. That is the first one. I can't say whether that was

(Testimony of Otto W. Heider.)

prepared in my office or whether Mr. Rand brought this to my office, but I am sure I have seen these minutes before.

Q. The minutes of the meeting authorizing the execution of this mortgage provided it was to be, the money was to be borrowed from Callie B. Heider. Now, who is Callie B. Heider?

A. That is my wife.

Q. That is your wife? A. Yes.

Q. You are unable to state at this time——

A. Well, I am not sure whether they prepared them and brought them to my office, but I have seen the minutes.

The Referee: You saw them at that time?

A. Yes, or I am sure shortly after they were prepared I saw them.

The Referee: Mr. Bollenbeck, the record would be more complete if you would introduce the first mortgage into evidence as an exhibit. It is not in.

A. And the minutes, too. I would like to see them introduced to complete the record.

(Mortgage by Rand Truck Lines, Inc., to Mrs. R. R. Rand, dated September 28, 1944, and accompanying papers, so produced, was thereupon marked [44] Trustee's Exhibit 6.)

The Referee: And Mr. Heider asked that the minutes be introduced.

(Document entitled on the first page "By-Laws of Article I" so produced, was thereupon marked Trustee's Exhibit 7.)

(Testimony of Otto W. Heider.)

The Referee: I notice the minutes are not bound in a book. Wasn't there a book that these minutes were bound in?

A. Not unless Mr. Taylor has a book.

Mr. Bollenbeck: As a matter of fact, your Honor, they weren't even stapled together until I stapled them. They were just loose.

The Referee: In whose possession were these minutes at the time of filing the bankruptcy?

Mr. Taylor: I had them in the office, your Honor.

Mr. Bollenbeck: In the office of Mr. Taylor.

Mr. Tonkon: He delivered them to me immediately prior to the filing of the petition and I turned them over to the Trustee's counsel.

Q. (By Mr. Bollenbeck): Now, Mr. Heider, weren't you vitally interested in having a proper resolution drawn by the corporation to authorize the execution of these mortgages?

A. I think that is a good idea. I have no objection to it.

Q. As a matter of fact, it is essential, isn't it?

A. Well, not necessarily, not necessarily, where you are [45] holding the stock of the corporation and showing the legal owner on the title, it isn't necessary.

Q. And you mean you didn't show any interest whatsoever in what the minutes of the corporation showed?

A. Oh, yes, I think that is very essential.

Q. And as a matter of fact you prepared them, didn't you?

(Testimony of Otto W. Heider.)

A. I may have checked them but I don't know whether they were prepared, whether Mr. Rand's attorney prepared them or whether I prepared them. I may have prepared them.

Q. Well, have you compared the typewriting of those minutes of that meeting and the original mortgage?

A. Well, I have five typewriters in my office and——

Q. Well, it is fortunate that these were prepared on the same one, then, isn't it?

A. Were they prepared on the same typewriter? That is the one.

Q. Now, this original first mortgage was prepared in your office? A. Yes.

Q. And the minutes seem to be prepared on the same typewriter.

A. They very likely were, then.

Mr. Tonkon: Will you qualify the minutes?

Q. (By Mr. Bollenbeck): Minutes of the meeting of September 28, 1944.

A. They were likely written in my office. The typewriting looks familiar. [46]

Q. And it looks identical, does it not?

A. Yes, quite familiar. They are not identical because I think they are probably on different typewriters, but on Royal, different typewriters.

Q. Now, Mr. Heider, these checks indicate that you paid this money to Rand at the rate of \$500 a month—\$500 a week, rather.

A. Yes, I think that is better.

(Testimony of Otto W. Heider.)

Q. Why was that done?

A. I didn't have the money.

Q. You were unable to pay the full amount right at that time?

A. That is right.

Q. However, your mortgage as prepared, you were collecting interest on the full amount for the full period of time?

A. Yes, but I settled with Rand on the interest too, I paid Rand interest.

Q. You paid Rand interest?

A. Yes, I did.

Q. What rate did you pay Rand that?

A. Oh, I think I paid him 8 per cent.

Q. Did you have a written agreement with him on that?

A. I think I had a collateral agreement with him, because he didn't pay it—didn't turn the stock of the company over until I settled with him in full. I have the stock here now. You haven't asked for [47] it.

Q. Mr. Heider, I thought I had the stock.

A. Do you have the stock? Maybe we have two sets of stock, then. That is okeh. I guess we got two sets of stock.

The Referee: Do you have checks to show the interest that you paid to Rand?

A. I think they are in there, I think most of them are in there. That was a private matter between Mr. Rand and myself because I didn't have the money to pay him at the time.

Q. (By Mr. Bollenbeck): Now, these payments

(Testimony of Otto W. Heider.)

on this first mortgage that you have shown here as Trustee's Exhibit 1, how were those payments received? A. By check.

Q. All of them by check?

A. Oh, I think so.

Q. And did you at any time get cash?

A. I think they came through the mail from Rand Truck Line.

Q. Did you ever get cash any time?

A. Oh, probably did, but most of the time it was by check.

Q. Who paid the payments to you?

A. Oh, some representative of the Rand Truck Line.

Q. Who would they be?

A. Oh, Mr. Taylor, Mr——

Q. We are talking about the first mortgage now. Mr. Taylor wasn't with the company now at the time of the first mortgage.

A. Well, the first mortgage—well, I think maybe Mr. Markee, [48] the principal officer.

Q. Which Mr. Markee?

A. Well, it might have been in some cases Loren Markee, but the most of the time I think it was Vern Markee.

Q. And did they pay in cash?

A. Did they pay in cash?

Q. Yes.

A. Sometimes they paid in cash but most of the times they paid in check.

(Testimony of Otto W. Heider.)

Q. Most of the time they paid by cash?

A. It might be so. And sometimes it was paid by check and I would give receipts too.

Q. And on your receipts you would specify it was by check or cash? A. Oh, not always.

Q. Not always? A. Not always.

Q. Mr. Heider, I am going to refer——

(Sheaf of receipts, so produced, was there-upon marked Trustee's Exhibit 8.)

Q. (By Mr. Bollenbeck): I am going to refer you to Trustee's Exhibit 1 and the payment of September 15, 1945, in the amount of \$1000 and hand you Trustee's Exhibit 8, dated September 14, 1945, in the amount of \$1,050 and ask you why the discrepancy?

A. Well, there is probably some other item they owed me on [49] at the same time. That is probably—they are credited with \$1000, but there is probably some other item.

Q. What other item would it be?

A. That is four years ago. I couldn't tell you at the moment, but probably there is some other item.

Q. Do your records show what other item it was?

A. I don't have a record, but that might have been by check and by cash both. This may have been by check and by cash both, so I couldn't tell you.

Mr. Bollenbeck: As far as we are marking things by lot I would also like to include the rest of these exhibits with the one of September 14th so I can refer to them.

The Referee: All the receipts produced by Mr.

(Testimony of Otto W. Heider.)

Heider on the first mortgage may be included in Trustee's Exhibit 8.

Q. (By Mr. Bollenbeck): Now, on October 1st, 1945, you have got \$1000 there, and I hand you a receipt for \$1050.

A. That was on—I think there was some \$50, that it was on some services that I rendered.

Q. Now, what services? A. To whom?

Q. To whom?

A. Some services I rendered along about that same time or prior.

Q. To whom?

A. Well, it was to the Markees for operating the Rand Truck Line. [50]

Q. What kind of services would those be, Mr. Heider? A. Oh, legal services.

A. Oh, I thought you said you were never their lawyer?

A. I said the Rand Truck Line, for Bob Rand, while Bob Rand had it I was never attorney for Bob Rand.

Q. Oh, you were attorney for Rand Truck Line after Markee's took over?

A. Oh, I did some services after Markee took over, not for Rand.

Q. And you did prepare these mortgages, both of them?

A. Oh, they were prepared in my office.

Q. And you did prepare the corporation minutes? A. Oh, I don't know about that.

Q. What would they be paying you \$50 for?

(Testimony of Otto W. Heider.)

A. Legal services.

Q. What kind of services?

A. Various kinds.

Q. Let's be specific.

A. Some paper, document—they might come in with something to the Public Utilities Commissioner or something. It might be various legal services.

Q. Did you act for them before the Public Utilities Commissioner?

A. No, I never appeared before the Public Utilities Commissioner.

The Referee: Did you render some statement to them that you might have copies of? [51]

A. No, I didn't render statements to them that I recall, but I might find statements of it, though. That was four years ago and I might possibly go back and find the statements.

Q. (By Mr. Bollenbeck): Now, I am going to refer you, Mr. Heider, to a receipt issued to Vern Markee on January 11, 1946, in the amount of \$450.

A. I think that was on that mortgage over there.

Q. Do you know whether that was paid in cash and check?

A. Well, it might have been paid both ways, cash and check.

Q. You did get cash quite a bit of the time?

A. Oh, yes, and I paid out cash too.

Q. In other words, your statement when you first started talking about cash and checks is not quite correct?

(Testimony of Otto W. Heider.)

A. It is cash and checks both. I think sometimes they give me a check on that and part cash.

Q. And that happened a good many times, did it?

A. Well, a number of times.

Q. That you received cash and check?

A. Yes.

Q. Do you know any reason why it would take place that way?

A. Now, why they wanted to pay their debts that way I don't know. They probably had the money available and wanted to pay it that way is all I can tell you.

Q. Now, you, of course, filed your income tax return for '44, '45, '46, and '47? [52]

A. Yes.

Q. And in making those income tax returns did you make the proper entries for interest collected and interest paid? A. Oh, yes.

Q. And will you produce those income tax returns here? A. I haven't got them.

Q. You haven't got them?

A. With me, no.

Q. Do you have them available in Sheridan?

A. I don't know whether I have them available or not. I think that I have copies available.

Q. Will you produce the copies?

A. Well, I don't have them here.

Q. Will you produce them at a time to be fixed by the Court? A. I could produce them.

Mr. Bollenbeck: I would like to ask the Court for an order.

(Testimony of Otto W. Heider.)

Q. Will those income tax returns show these particular items? A. No, they won't.

Q. Do you have any documents or records showing these particular items?

A. Well, on that \$50 item I think I can find maybe a statement or something for that.

Q. And how about the interest earned and interest paid on these mortgages and paid to Rand?

A. You have cancelled checks. [53]

The Referee: How do you keep books to determine what interest is earned?

A. I keep a separate set of books for that.

The Referee: You have a separate set of books?

A. Yes, I have.

The Referee: And you make those entries of these payments? A. Yes, that is right.

Q. (By Mr. Bollenbeck): Mr. Heider, didn't the Court order you to produce the original books today? A. I produced the books.

Q. I am talking about the books.

A. You have it over there.

Q. You have now told the judge you have a set of books.

A. He was asking about income tax returns.

Q. You have to enter these items.

A. I don't have to enter who pays them, where they come from, that way. I just enter that much.

Q. You do have a ledger sheet on this transaction?

A. No. You have the sheet on the transaction right there. I give it to you awhile ago.

(Testimony of Otto W. Heider.)

Q. From what books and records do you determine your income tax?

A. Well, I have a separate set of books showing my income and disbursements.

Q. Has that got a sheet for this transaction? [54]

A. Not a particular sheet for that. I enter it up just as the thing accrues.

Q. Do these records show to whom you paid the money and from whom you received it?

A. Not to whom, it doesn't show that. That isn't required.

Q. All it shows is receipts and disbursements?

A. What?

Q. All it shows is receipts and disbursements?

A. Receipts and disbursements.

Q. No names? A. No names.

Q. No transactions identified?

A. No transactions like this would be set up like that.

Q. Have your books ever been checked by the Internal Revenue Department?

A. Oh, they are checked every year.

Q. And they approve that kind of books and records?

A. Well, they set them up for me and they are checked every year, have been for years.

Mr. Bollenbeck: I would like to ask the Court for an order requiring Mr. Heider to produce his books and records. His testimony is very unsatisfactory, and I trust that the books and records will be

(Testimony of Otto W. Heider.)

more satisfactory. I'd also like a copy of his tax returns.

A. You have all the books and records that I have got. [55]

The Referee: He stated those books will not show anything on these transactions.

A. Show absolutely nothing.

The Referee: I will not make such an order at this time. Now, has he produced the receipts on the second mortgage showing what the balance is? What is that item?

A. On the first mortgage?

Q. (By Mr. Bollenbeck): I haven't got to the second mortgage yet.

A. Let's see, I thought I had given it to you. No, here it is on the second mortgage. Here is the assignment too. You didn't ask for that, Mr. Bollenbeck.

Q. You have, I take it, in your claim on the second mortgage demanded the entire amount at this time?

A. You called me up, Mr. Bollenbeck, and said you wanted to pay it off, and I told you the amount.

Q. What did you tell me at that time?

A. I told you I would give you a discount.

Q. How big a discount?

A. I don't remember now whether it was 3 or 4 per cent.

Q. Well, in your claim that you filed in here you have accelerated the mortgage and claimed the entire amount.

A. The mortgage accelerates itself.

(Testimony of Otto W. Heider.)

Q. In other words, it is your position that the mortgage has accelerated? [56]

A. There is a breach in it.

Q. And the entire amount is due and owing?

A. That is according to the terms of the mortgage.

Q. And that is according to your understanding of it?

A. That is the way it reads.

The Referee: His proof of claim states that.

Q. (By Mr. Bollenbeck): I notice, Mr. Heider, there are some payments that you say "Received from R. J. Werner." Who is R. J. Werner?

A. Oh, that is a truck that Mr. Taylor sold that was taken out of the mortgage and it was leased to Mr. Werner and he made some payments on it.

Q. He paid them direct to you, did he?

A. Yes.

Q. And it was applied on the mortgage?

A. They were applied on the mortgage. It was a Sterling truck, I believe, a single axle.

The Referee: Do you want to introduce that statement into evidence?

A. If the Court please, are those certificates of title introduced in evidence?

The Referee: No, they are not.

(Tabulation with beginning date 11-2-48 and closing date of 5-10-49 and accompanying payers, so produced, was thereupon marked Trustee's Exhibit 9.) [57]

Q. (By Mr. Bollenbeck): Now, Mr. Heider, who

(Testimony of Otto W. Heider.)

at the Internal Revenue Department set up your books?

A. Oh, I can't tell you. About ten years ago they showed me the system to use, and that is the system I have been using ever since.

Q. Do you have any objection to this court selling this equipment free from the lien of your mortgage with the amount and validity of your mortgage to be determined in the future by this Court?

A. I asked you on the phone, Mr. Bollenbeck, if you had a buyer of it and instead of giving me a civil answer you gave me anything but one, so I don't know what you have in mind.

Q. Just answer my questions.

A. No, I wouldn't want to handicap the Company if they had a buyer, a cash buyer, and then the amount could be determined. I wouldn't have any objection to it if they had an immediate cash buyer and wanted to make a sale if it would expedite matters or be of any advantage to the corporation. I wouldn't have any objection.

Q. You would have no objection to do that then? Well, that being the case would you be willing to surrender the title policies to the Trustee in Bankruptcy?

A. Whatever Referee Snedecor says in that regard I will be very glad to comply with his request.

The Referee: Mr. Heider, it is the practice of this Court [58] to sell property free from liens, the order providing that the proceeds shall be impressed with all valid liens as determined by the Court.

A. That is satisfactory.

(Testimony of Otto W. Heider.)

The Referee: And if an order is so made it would provide that the proceeds shall be held in lieu of the property itself.

A. That is right.

The Referee: To be impressed with any valid liens and the money paid on those liens by order of the Court.

A. That is okeh, satisfactory with me.

Mr. Tonkon: Of course, subject to the further determination of the Court as to the validity of the liens.

The Referee: Validity and amount of the liens, amount owing.

Mr. Bollenbeck: In this particular case, your Honor, because of the unusual circumstances I would like to keep the mortgage alive in favor of the Trustee in Bankruptcy. I don't just exactly know how it is going to be done yet.

Mr. Tonkon: How do you mean "yet"?

Mr. Bollenbeck: Without being cancelled.

The Referee: Well, selling the equipment doesn't satisfy the mortgage. The mortgage is still there and the proceeds are held in lieu of the mortgaged property. That is a matter that you might determine by the order. Mr. Heider has the assignment of this second mortgage. Perhaps that should go [59] in evidence.

Mr. Bollenbeck: Yes.

(Assignment of mortgage and note dated August 7, 1946, so produced, was thereupon marked Trustee's Exhibit 10.)

(Testimony of Otto W. Heider.)

The Referee: It will be understood that if a satisfactory sale is made that Mr. Heider will then present the certificates of title endorsed so that the assets may be transferred without delay to the purchaser. A. That is very satisfactory.

Mr. Tonkon: I think the order should also include some papers or documents in connection with the Rand Truck Line.

A. If the Court please, if it will be of any assistance to Mr. Bollenbeck about maintaining the mortgage, I can make an assignment of the mortgage to the Trustee if it will be of any assistance.

The Referee: Well, that will be a matter of future determination. Now, Mr. Heider, do you have in your possession any original documents that belong to the Rand Truck Line, the Bankrupt?

A. Well, these certificates of stock here.

The Referee: You have certificates of stock? I think you gentlemen might, without encumbering the record, check those between yourselves afterwards while you are still here. Do you have any original corporate minutes? [60]

A. No, I don't have any at all. Those are all.

The Referee: The reason I ask you that question is that I notice that the corporate minutes authorizing that first mortgage seem to be the carbon copies. A. That is the original.

The Referee: Well, I saw one carbon copy.

Mr. Bollenbeck: They have copies in there too, your Honor.

The Referee: I see. Well, then, the order of the

(Testimony of Otto W. Heider.)

Court will be that the property may be sold free from lien, including in the order the safeguards which have already been mentioned, and the Court will not at this time pass on the question of the amount owing or any questions that might be raised as to the validity of the mortgage. Those are questions that Mr. Heider will have ample opportunity to meet at the time, but it is hoped, Mr. Heider, that we can sell this truck line, the equipment, as a going concern in order to get some value out of the permits, and it would be to the advantage of all. We expect to sell it for considerably more than the amount you claim and the matter of determining the validity and amount of your lien will be taken up and if the Trustees have any objections to it you will be served with the objections and then there will be a further hearing on it. I am not determining that matter at all. Is that all now?

Mr. Bollenbeck: I have Vern Markee here.

The Referee: Well, it is noon now. He was subpoenaed? [61]

Mr. Bollenbeck: Yes, your Honor. I take it the gentlemen will still be under subpoena for the rest of the day?

The Referee: Yes. Was Mrs. Markee subpoenaed?

Mr. Bollenbeck: No, she wasn't.

The Referee: We will take up again at 2:00 o'clock.

(Witness excused.)

(Noon recess.) [62]

Afternoon Session—2:30 P.M.

The Referee: Now, Mr. Vern Markee, will you come up, please.

VERN MARKEE

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bollenbeck:

Q. You are Mr. Vern Markee?

A. Yes.

Q. And Florence Markee is your wife?

A. That is right.

Q. When did you first become connected with the Rand Truck Line?

A. In about September of 1943.

Q. And how did you become connected with the Rand Truck Line?

A. My operation was consolidated and I went in as a partner with Bob Rand.

Q. Well, you bought some stock in the Rand Truck Line, didn't you?

A. That is right.

Q. You bought 250 shares of stock and your wife Florence Markee took 250 shares of stock?

A. Yes.

Q. And what did you pay for that stock? [63]

A. There wasn't any cash involved. It was a transfer of equipment.

(Testimony of Vern Markee.)

(Carbon copy of document dated December 27, 1943, so produced, was thereupon marked Trustee's Exhibit 11.)

Q. (By Mr. Bollenbeck): I hand you Trustee's Exhibit 11 for identification which purports to be a bill of sale signed by yourself and Florence Markee transferring certain equipment to the Rand Truck Line. Is that the equipment that you turned over to Rand in return for these 500 shares of stock?

A. Yes, it is.

Q. And this bill of sale was delivered at that time?

A. Yes, sir.

Q. Now, this specifically covers "all permits of the Public Utilities Commission of the State of Oregon and the United States Interstate Commerce Commission for the operation of the above-described trucks as a common carrier." Now, what permits did you have at that time, Mr. Markee?

A. I had a Public Utility Commission permit, anywhere for hire permit within, from and to sixty road miles radius of Sheridan.

Q. Is that the only permit you had?

A. No, that was the Public Utilities Commissioner permit.

Q. What other permits did you have?

A. I had an Interstate Commerce permit which was authority to haul interstate commerce freight between Portland and Sheridan. [64]

Q. Were those the only permits you had?

A. That is right.

(Testimony of Vern Markee.)

Q. And those were the permits that were transferred to the Rand Truck Line?

A. No. One of those permits was cancelled and the other was never transferred.

Q. Which one was cancelled?

A. The Interstate Commerce permit.

Q. The Public Utilities Commissioner permit was never transferred? A. That is right.

Q. Now, you are operating down there in Sheridan now, aren't you? A. That is right.

Q. And what kind of an operation do you have?

A. We have an anywhere for hire operation within, from and to a sixty road mile radius of Sheridan.

Q. Are you using the permit that is covered under this bill of sale? A. Yes.

Q. And you are operating in competition with the Rand Truck Line? A. Yes.

Q. On a permit that you give a bill of sale to?

A. The permit was never transferred.

Q. Well, now, you give a bill of sale to it, didn't you? A. That is right. [65]

Q. Why wasn't it transferred?

A. Because it didn't have the authority of the Public Utility Commission.

Q. Did you ever apply for that authority to transfer it? A. No, sir.

Q. And you were an officer of the corporation at that time? A. Yes.

Q. There is a suit pending now by the Rand Truck Line against you, is there not, involving this

(Testimony of Vern Markee.)

same permit? A. Yes.

Q. What excuse do you have for continuing operation under a permit that belongs to the Rand Truck Line?

A. The permit doesn't belong to Rand Truck Line.

Q. Well, it doesn't belong to it merely because you yourself failed to have it transferred, doesn't it?

A. No. The permit—when I went in with Rand, why, the permit was not transferred because at any time if I wanted to I could reinstate the permit. The permit was froze for the duration of the war.

Q. Wait a minute—that you could reinstate the permit? A. Yes.

Q. As your own property?

A. I froze the permit. The permit has always been in mine and my wife's name.

Q. But you transferred it to the Rand Truck Line by this bill [66] of sale.

A. No. It was never transferred.

The Referee: You agreed to transfer it, you mean?

A. Yes.

The Referee: Did you get the 500 shares of stock?

A. I got 250 and my wife got 250.

The Referee: That was full consideration?

A. Yes.

Q. (By Mr. Bollenbeck): Since you agreed to transfer this permit to the Rand Truck Line are

(Testimony of Vern Markee.)

you willing to abide by your agreement and transfer it.

A. Well, the agreement with Bob Rand was subject to the fact that if I wanted to resume operation that it could be, that the permit was still mine; in other words, there was no consideration for the permit in the first place. The Public Utilities Commission will not let you transfer the permit without a hearing and it was not the intent.

Q. Is there anything in writing that says that?

A. Yes.

Q. What?

A. An agreement between Bob Rand and myself.

Q. Let's see it.

A. I don't have it with me.

Q. Can you produce it? A. Yes. [67]

Mr. Bollenbeck: I would like to ask the Court for an order requiring him to produce it.

The Referee: You will be asked to produce that at a future hearing and we will fix a time for it.

Q. (By Mr. Bollenbeck): Now, subsequent to that time, Mr. Markee, did you purchase any additional stock in the Rand Truck Line?

A. Yes.

Q. Well, when did you buy some additional stock and from whom did you purchase it?

A. From Bob Rand in 1945, I believe.

Q. And how many shares of stock did you buy then? A. I don't remember.

Q. Well, I will refresh your memory. Did you buy 2,000 shares and Loren Markee buy 2,000 shares? A. I believe that is right.

(Testimony of Vern Markee.)

Q. 4,000 shares. And how did you pay for that stock? A. We didn't.

Q. We didn't? A. No.

Q. Well, just what was the transaction?

A. We signed a mortgage with Otto Heider.

Q. This mortgage was \$43,560, I think. How much did you agree to pay for this stock?

A. That I don't know.

Q. Well, you certainly must know how much you were going to [68] pay.

A. Well, it was for the balance of the stock we was buying at par value from Bob Rand, outstanding stock that my wife and I did not have.

Q. That was 4,000 shares?

A. That is right.

Q. Now, who acted as your lawyer in that transaction? A. I don't believe we had a lawyer.

Q. Was Mr. Heider involved in the transaction?

A. Mr. Heider was there, yes.

Q. Was he there before the deal was made?

A. No.

Q. Well, now, how did you—what was the first document you signed between yourself and Rand involving the sale of this stock?

A. I believe it was an agreement. I am not sure. It's been a long time.

Q. An agreement to buy at par? A. Yes.

Q. Would that be \$40,000, 4,000 shares at \$10 a share? A. Yes, I believe that is right.

Q. Well, now, do you know, Mr. Markee, or don't you?

(Testimony of Vern Markee.)

A. I am not sure. It's been a long time ago. You have got all the stuff there.

Q. No, I haven't got that. You heard Mr. Heider's testimony [69] this morning that he paid the Rands about \$36,000.

A. Yes.

Q. Is that what the purchase price of the stock was?

A. The purchase price of the stock was what remained of the issued stock that we did not have.

Q. Well, how much were you going to pay for that?

A. Par value, whatever it was.

Q. Well, par value I think would be \$40,000, but you didn't pay \$40,000 for it.

A. What did we pay for it?

Q. Did you pay any money to the Rands other than the money that Mr. Heider paid them?

A. No, we didn't.

Q. You didn't. Did Loren Markee put up any money at the time?

A. Yes.

Q. In addition to the money that Mr. Heider paid?

A. Yes. That wasn't paid to Rand.

Q. Where did that money go?

A. I don't know.

Q. What do you mean you don't know?

A. It is like I said, it's been a long time ago. It's all down there in the record.

Q. The money that Loren Markee paid, did it go into the corporation?

A. The money he put in went in for stock. I am sure it didn't [70] go for the corporation.

Q. To whom did it go, to you?

A. No.

(Testimony of Vern Markee.)

Q. Did it go to Mr. Heider?

A. No. I believe it went to Rand. I am not sure.

The Referee: Do you remember how much it was? A. \$5,000.

The Referee: \$5,000. That was in cash?

A. Yes.

Q. (By Mr. Bollenbeck): In other words, now the transaction is that Loren Markee paid \$5,000 to the Rands and Mr. Heider paid approximately \$36,500 to the Rands and for that you and Loren equally got 4,000 shares of capital stock in the Rand Truck Line, is that right?

A. Got 4,000 or 2,000?

Q. You got 2,000 each?

A. That is right.

Q. And I understand you did not put up any cash. A. No. I put up my equipment.

Q. Well, I mean that equipment was for that 500 shares that you had originally purchased.

A. That is right.

Q. But for the additional 2,000 shares that you purchased you did not put up any money?

A. No. [71]

Q. Now, when did Mr. Macy come into the corporation? A. About 1946.

Q. And how did he come in, I mean did you and Loren sell him some stock? A. Yes.

Q. And how many shares did you sell him?

A. I don't recall. We split it three ways again, split it three ways instead of two ways.

Q. And what consideration did he pay?

(Testimony of Vern Markee.)

A. \$5,000.

Q. To whom did he pay it.

A. My brother and I.

Q. Now, how did Mr. Taylor come into the picture? Did he buy stock or was that stock given to him?

A. That stock was given to him.

Q. The stock was given to him. Now, getting back to this first mortgage that the Rand Truck Line gave——

A. May I clear up one item, your honor? That \$5,000 that Mr. Macy put in was turned over to Mr. Heider on the mortgage.

Q. (By Mr. Bollenbeck): Who made the payments to Otto Heider on this first mortgage?

A. Oh, I made some of them myself, some of them were mailed in, Gordon Mize in Portland made some of them.

Q. Were they made in cash or by check?

A. Both. [72]

Q. Where did the cash come from?

A. Came out of the company.

Q. And did the checks come from the company too?

A. Yes.

Q. When those payments were made to Mr. Heider how were they entered in the books, do you know?

A. No, I don't.

Q. Isn't it a fact that they were first entered as an account receivable from officers, isn't that the way you first entered them in the books?

A. I never entered them myself. I didn't take care of the bookkeeping.

(Testimony of Vern Markee.)

Q. Well, you supervised the bookkeeping, did you not? A. No. I was there.

The Referee: Who was your bookkeeper?

A. Allan Brigg, Portland, the office manager. He took care of the books.

Q. (By Mr. Bollenbeck): Now, Mr. Markee, I am going to hand you here Trustee's Exhibit 1 for identification and I am going to also hand you here an analysis of your other investment officers account. Can you tell me why Mr. Heider should show that \$1,000 payment was received and why on the same date a charge should be made against the officers, say on December 28, 1944? Otto Heider shows a credit on the mortgage of \$1,000 and you show that you have charged the officers account \$520.57. [73] Can you tell me why that discrepancy?

A. I have no knowledge of this at all. I can't say.

Q. Well, let's take the statement of March 30th, 1945. Your account officers shows a charge against you and payment to Otto Heider of \$463.26. Otto Heider shows a credit on the mortgage of April 2nd of '45 of \$1,000. Now, I have here your original accounts receivable for 1945—strike that. Well, I am going to have to change my question here because of the books. You show, Mr. Heider shows on April 2nd, 1945 a credit of \$1,000. Now, on March 9th, 1945 you paid R. R. Rand, or rather there was charged to your officers account on account of a payment to R. R. Rand, of \$472.93, and on March

(Testimony of Vern Markee.)

30th Otto Heider \$463.26. I see an entry here in your accounts receivable which is \$496.19, being the total of those two checks or those two charges against your account to Rand and Heider. Now, where did the difference between this \$463.26, which was charged to your account and paid to Heider, and the \$1,000 which he shows as a credit come from?

A. It came from out of the company as far as I know.

Q. You mean there was income from the company that didn't go through the books?

A. If it doesn't show it on there. I didn't keep those books. I am not sure what there is in there. You seem to have some trouble figuring them out yourself. I don't see how you expect me—I am not an accountant. [74]

Q. Was there income from the use of the company equipment that did not go through the books of the Rand Truck Line? A. Yes.

Q. And where was that money paid?

A. It was paid to Otto Heider.

Q. Now, was that a consistent practice of the Rand Truck Line at that time?

A. That didn't happen very often.

Q. How often did it happen?

A. That I can't say.

Q. What was the purpose of earning money with the use of the company equipment and not putting it through the company books?

A. That I can't say.

(Testimony of Vern Markee.)

Q. You were doing it, weren't you?

A. I was there, yes.

Q. You were in fact the controlling officer of the company, weren't you? A. Yes.

Q. Well, why did you do it?

A. Well, we didn't have any adequate book-keeping system and I wasn't a bookkeeper myself, and it was——

Q. You knew it was going on? A. Yes.

Q. Was it to defeat income tax purposes?

A. I don't know. [75]

Q. Was it to pay for your stock without building up a charge against you on the company books?

A. That I don't know.

Q. You were doing it. Why were you doing it?

A. I have often wondered myself. I don't know.

Q. Would you say as a practical matter that the difference between the credit that Mr. Heider shows on this mortgage and the amounts that you are charged with in the company books that that difference is the amount of company business that didn't go through the company books?

A. That I don't know.

Q. Did you secure any funds from any other source to pay Heider? A. No.

The Referee: All payments to Mr. Heider were earnings from the company, is that right?

A. Yes.

Mr. Tonkon: I think there is one exception, your Honor. The \$5,000 that he paid went to Mr. Heider.

A. Both \$5,000 went to Heider.

(Testimony of Vern Markee.)

The Referee: One of them went to Mrs. Rand on the original purchase, is that right?

A. I believe that is right.

Q. (By Mr. Bollenbeck): Now, isn't it a fact, Mr. Markee, that the original mortgage was never set up on the books of the [76] company.

A. Yes, that is right.

Q. And that the second mortgage, the Public Utilities Commission insisted that the second mortgage be set up on the company books?

A. Yes.

Q. And at that time you, in order to set it up on the company books, you took this balance of \$13,168 that was still due on the first mortgage and you charged it to yourself on the company books?

A. I didn't do it, but it was done.

Q. That is what was done?

A. That is right, I recall that.

Q. And it was done with your consent and knowledge at the time it was done?

A. Yes.

Q. Now, what is the value of that everywhere for hire permit that you are operating down there now?

A. It has no value.

Q. Well, perhaps theoretically it doesn't, but actually what is it worth?

A. Well, it can't be mortgaged. It is just whatever anybody is willing to pay for it.

Q. You are giving the Rand Truck Line pretty severe competition down there aren't you?

A. I wouldn't say that. [77]

Q. What was your net earnings last year?

(Testimony of Vern Markee.)

A. \$8,000 about.

Q. That is off the truck line operation?

A. Yes.

Q. And before you went into competition with the Rand Truck Line was the Rand Truck Line handling that business that you are doing now?

A. Part of it.

Q. What big a percentage?

A. I'd say it's been 75 per cent of it.

Q. It could be 90 per cent, couldn't it, rather than 75?

A. I don't think so.

Q. Did Mr. Heider draw up the original mortgage for you?

A. I am not sure.

Q. Well, who did?

A. I say I am not sure.

Q. Who was your attorney at that time?

A. I don't believe I had an attorney unless it was Mr. Heider. He was handling—

Q. Now, as far as Mr. Heider paying the money to Rand, was that arranged prior to the time that this sale went through?

A. Well, that I don't know.

Q. You mean the Rands just agreed to give you their stock in this company in return for this note without knowing whether they could cash it in or not? [78]

A. Oh, we made an agreement with Mr. Rand to finance it. What arrangements he made—we made an agreement with Mr. Heider to finance it. What arrangements he made with the Rands I do not know.

(Testimony of Vern Markee.)

Q. But you talked to Mr. Heider and arranged for the financing of it, is that right?

A. That is right.

Q. And that was all, that arrangement was made before your deal with the Rands was finally completed?

A. Yes, it had been.

Q. So the Rands knew they were going to get their money from Mr. Heider before they sold the stock to you?

A. Yes.

Q. Now, let's go to the second mortgage. What was the occasion for having that executed?

A. To refinance.

Q. Why was that property of yours down there, that terminal building of yours, included in the mortgage?

A. Additional security.

Q. Had you owed Mr. Heider any money on that prior to that time?

A. No, sir.

Q. Had you owed him any money for any other reason prior to that time?

A. I had had dealings with him, yes.

Q. I mean unpaid, money that was unpaid at that time? [79]

A. No.

Q. When did you buy your house from Mr. Heider?

A. I believe it was in May in 1946 or '7, 1946.

Q. '46. That was prior to the time this mortgage was given. This second mortgage—in order that you won't be confused, it was executed the 7th day of August, 1946.

A. Well, I could be mistaken there.

Q. So you did buy the house from him a few

(Testimony of Vern Markee.)

months prior to the execution of this second mortgage? A. That is right.

Q. And how much did you pay for this house?

A. \$9,400.

Q. You have a better memory than Mr. Heider. He couldn't remember this morning.

The Referee: He has been paying for it.

Mr. Heider: If the Court please, I don't want to be the least bit captious here, but this private transaction between us and Mr. Markee hasn't the slightest bearing on this, foreign entirely to it all.

The Referee: I don't either, but the examination permitted under the Bankruptcy Act is very broad.

Mr. Heider: I am amused by the house transaction because I can't see the slightest relevancy.

Q. (By Mr. Bollenbeck): How did you purchase this house from Mr. Heider, on a conditional sales contract or a mortgage? [80]

A. Mortgage.

Q. You took title to the property and give a mortgage back?

A. Yes, sir—I am not sure. Wait a minute. I would have to check.

Q. Well, what is the present balance on it?

A. Around \$5,000.

Mr. Heider: I still have the title.

The Referee: I figured Mr. Heider wouldn't take back a mortgage for the full purchase price.

Q. (By Mr. Bollenbeck): Now, let's talk about your terminal, Mr. Markee. When and where did you buy this land?

(Testimony of Vern Markee.)

A. I bought it from Mrs. Haas at Sheridan.

Q. That land was unimproved at that time, was it not? A. That is right.

Q. How much did you pay for it? A. \$900.

Q. And when did you pay for it, when did you buy it? A. About 1944, somewhere in there.

Q. Now, did you build a terminal on that land?

A. Yes.

Q. You built a building? A. Yes.

Q. And where did you get the money to build the building? A. I borrowed it from Mrs. Haas.

Q. As a matter of fact, you took it out of the company, didn't [81] you? A. No, I did not.

Q. Did you take any part of it out of the Rand Truck Line funds? A. I did not.

Q. Do you know that you are charged on the books of the corporation with a substantial number of hundreds of dollars for building the Sheridan terminal? A. Yes, I saw that.

Q. Well, what is your explanation of that charge?

A. That is not a just charge. It shouldn't be on there. Some of the stuff was purchased through Rand Truck Line but the money went back into Rand Truck Line.

Q. I don't understand your statement. You were in charge of the corporation at that time, were you not? A. At that time.

Q. And you had the opportunity and the right to dictate what should go into the books of the company, did you not? A. Yes.

(Testimony of Vern Markee.)

Q. And these charges were made against you?

A. It is \$1,300. I know what it is and it shouldn't be on there.

Q. Well, why didn't you have it corrected, then?

A. Too busy moving the freight, I guess.

Q. Now, do you know what it represents, the \$1,300?

A. No, I do not. [82]

Q. If the company can produce vouchers to show that \$1,300 went into the Sheridan terminal would you still dispute the amount?

A. No. I told you it is \$1,300, and I know what it was.

Q. What was it then?

A. Material purchased for the terminal.

Q. What terminal?

A. For the terminal at Sheridan.

Q. Was that the terminal that was being built on your land?

A. Yes.

Q. In other words, the company did purchase \$1,300 worth of stuff that went into that terminal?

A. The money went through the company books, the accounts went through the company books. The money was put back into the company.

Q. How was it put back into the company?

A. That was some of the money evidently that went to Otto Heider.

Q. You mean that you bought some materials to build your Sheridan terminal and they in order to repay the corporation for that \$1,300, you paid some money to Otto Heider, is that—

A. No, sir. The money went back into the com-

(Testimony of Vern Markee.)

pany and there could have been some of the money that went in to Otto Heider. I don't know.

Q. Could it have been some of the money that went to Otto Heider [83] in cash?

A. It could have been.

Q. That was the terminal where you afterwards leased to the Rand Truck Line, was it not?

A. That is right.

Q. And that was the terminal where you endeavored to secure a cancellation of about \$10,000 liability of yours in order to give them a lease, isn't that right?

A. They did sign a release on that, yes.

Q. What was the reason for demanding a \$10,000 bonus for signing a lease on your terminal?

A. I didn't consider that \$10,000 bonus. Mr. Taylor stated time and again that it was not a good entry on the book and should never have been on there, and when we—when we sold our stock to Rand Truck Line our lawyers suggested that we have Mr. Taylor give a release, which he did.

Q. You were on the books as owing Rand Truck Line over \$10,000, weren't you, for the money that went to Otto Heider?

A. That was—should have been the stockholders and not myself personally. Why they set it up in my name, I don't know.

Q. In other words, it should have been you and Loren Markee and Harold Macy?

A. The stockholders, yes.

Q. And the amount in fact is over \$27,000 when

(Testimony of Vern Markee.)

you add all three of them up, isn't it, the money on the corporation books [84] that went to Mr. Heider?

A. I am not sure it is that much. I believe that is what it was in the officers account.

Q. Well, you regard this cancellation of this \$10,000 item against yourself merely as a bookkeeping entry, is that what you understood it to be, just to clear the books? A. Mr. Taylor said——

Q. I am not asking what Mr. Taylor said. What did you think? Did you regard it merely as a bookkeeping entry?

A. No. The lawyer suggested that we get a signed release when we got out of Rand Truck Line.

Q. Who was your lawyer?

A. John Hickson.

Q. And you attempted to extract a \$10,000 bonus from the Rand Truck Line by the company cancelling your indebtedness to it in order to give them a lease in Sheridan?

A. I didn't consider it as such.

Q. They had been leasing that property prior to that time, hadn't they?

A. No, there hadn't been no lease on it up till then.

Q. They had been renting it from you?

A. That is right.

Q. What rent had they been paying?

A. \$50 a month.

Q. And what rent were you going to get under the lease? [85] A. \$50.

Q. You are using it yourself now? A. Yes.

(Testimony of Vern Markee.)

Q. And how long did that lease, how long did the Rand Truck Line occupy that terminal before you cancelled the lease? A. Approximately a year.

Q. Why did you cancel it?

A. They broke their lease and didn't pay their rent.

Q. And did you sell your stock to Loren Markee?

A. Yes.

Q. And what did he pay you for it?

A. I got a '41 Chevrolet coupe.

Q. He gave you a '41 Chevrolet coupe for it?

A. I believe it was a '41.

Q. He gave you a '41 Chevrolet coupe for your stock in the Rand Truck Line?

A. That is right.

Q. Now, let's talk about the Delake terminal.

A. While we are on that stock, we might add that my wife didn't get anything for hers.

Q. She turned hers over to Mr. Taylor, didn't she? A. After he insisted on it, yes.

Q. Now, the terminal at Delake is on leased ground, is it not? A. Yes.

Q. In whose name is the lease, do you know? [86]

A. Mr. Thayer.

Q. I know, but it was signed by yourself personally or by Rand Truck Line?

A. I never saw the lease. The Portland manager at the time made the lease agreement.

Q. Now, who paid for building the terminal at Delake? A. I paid for part of it.

(Testimony of Vern Markee.)

Q. How much of it did you pay for?

A. Approximately \$1,000.

Q. And who paid for the rest of it?

A. The rest of it was financed by the bank at Taft.

Q. Now, as a matter of fact the Rand Truck Line paid a lot of funds out to build that terminal, did they not?

A. Well, the only funds that they paid out were financed through the bank as far as I know.

Q. As a matter of fact, Mr. Markee, didn't Rand Truck Line pay out \$1,255.41 to help build that Delake terminal?

A. Well, the Delake terminal was built in two sections, the same way as the Sheridan terminal. The original section of the terminal I built myself and it cost approximately a thousand dollars.

Q. And how about the second section?

A. That was paid by the company.

Q. Paid by the company. In whose name—did you claim that you owned that terminal at that time? [87]

A. I owned a good share of it.

Q. And when you went to what is now the North Lincoln Bank and borrowed some money on it—

A. Mr. Taylor did that.

Q. Mr. Taylor did that. Didn't you borrow some money on that, the first mortgage on it?

A. Maybe I did.

Q. Borrowed \$1,500 on it, didn't you?

A. I believe that is right.

Q. And then you sold the terminal to the com-

(Testimony of Vern Markee.)

pany? A. No. Mr. Taylor took the terminal.

Q. Did you know that you had gotten a credit on your investment account for \$1,919 on the Delake terminal? A. That is right, yes.

Q. So you sold it to the company for \$1,919 subject to \$1,500 mortgage, or whatever the balance was on that \$1,500 mortgage, is that right?

A. Well, that was another one of these messed up deals. I had owned that terminal a year before this addition had been put on there for which I didn't receive any rent.

Q. Well, why didn't you receive any rent? You were controlling the company.

A. The company wasn't in a position to pay out any more money.

Q. That company paid for part of that terminal and then you sold it back to the company. [88]

A. I actually never got any money out of it.

Q. You got your indebtedness decreased, didn't you? It was entered as a credit to you.

A. Well, that officers account, yes, if you want to credit the officers account. I had \$1,000 of my own money in the terminal plus a year's rent coming at that time.

Q. Did you know that that credit was given to you on the books of the Company at the time it was made? A. Yes, Mr. Taylor told me.

Q. It was done with your knowledge and consent? A. Yes.

The Referee: You stated you had \$1,000 in the

(Testimony of Vern Markee.)

Delake terminal and a year's rent. What about the \$1,500? Did the Company borrow that or——

A. No. The Company borrowed that. The original terminal was built about 24 feet long and cost approximately \$1,000, and the mortgage, the money was borrowed on it after the terminal was enlarged and that is what that money was for.

The Referee: You didn't get any money on that \$1,500 mortgage? A. No, sir.

(Chattel mortgage and note dated August 17, 1946, signed by Vern Markee, so produced, was thereupon marked Trustee's Exhibit 12.)

Q. (By Mr. Bollenbeck): Are you sure you are not mistaken about [89] not getting any money on this Delake terminal?

A. I didn't receive a dime.

Q. I am going to hand you Trustee's Exhibit 12, which is in amount \$1,300, dated August 17, 1946, in favor of you personally and also a note signed by you personally on the bank of \$1,300, on the Bank of Newport. Now, look that mortgage over and see if you can't refresh your memory as to whether you personally didn't get some money on that mortgage.

A. No, sir. If you check up on the books you will find it cost around \$1,300 to \$1,500. That was paid to Beverage & Hart. I don't know whether it is on the books or not, but that is what the bill was because the money was borrowed after the bill was submitted.

Q. Now, who are Beverage & Hart?

(Testimony of Vern Markee.)

A. That is this construction contractor, building contractor.

The Referee: Was that for the second addition?

A. Yes. The first addition was paid for at the time it was built by myself.

Q. (By Mr. Bollenbeck): And this was supposed to pay for the second part, is that right, in addition to what money the company paid out, this \$1,300 plus the \$1,255 that the company paid, is that supposed to pay for the second addition?

A. I didn't know the company paid out twelve hundred and some dollars.

Q. We have got the officers account charged, you charged with [90] \$1,255 for building the coast terminal.

A. Well, I don't know how that could be set up there because the money, after we received a statement from Beverage & Hart I went down to the bank and the banker loaned enough money to pay the construction cost. Where that \$1,200 in the coast terminal—Beverage & Hart also built the McMinnville terminal, but what the \$1,200 is doing on there I don't know. I am sure I didn't get any of it.

The Referee: Mr. Bollenbeck, have you quite a number of questions? We will have a recess if you have.

Mr. Bollenbeck: I would like a recess.

(Short recess.)

Q. (By Mr. Bollenbeck): I want to hand you Trustee's Exhibit 11, Mr. Markee, which is the bill

(Testimony of Vern Markee.)

of sale that you gave Rand Truck Line and particularly refer you to one Chevrolet panel 1941 half-ton truck, and ask you if you know what happened to that truck. A. That was sold.

Q. What was the amount that you received for it? A. Approximately \$600, I believe.

Q. Are you sure it wasn't \$800?

A. I am not sure whether it was \$600 or \$800.

Q. What happened to the money?

A. That was used in the business.

Q. Are you sure it wasn't used to purchase a 1938 Ford for [91] yourself, purchased, by the way, from Mr. Otto Heider?

A. I believe that is right.

Q. That is right. And did you take title to that '38 Ford in your own name? A. Yes.

Q. Although the Chevrolet was a company asset?

A. Yes. It is one of the pieces of equipment that I turned in when I went into it.

Q. And what happened to the '38 Ford?

A. That was traded on a car.

Q. You traded it in on a Cadillac, didn't you?

A. Yes, that is right.

Q. Have you still got the Cadillac? A. No.

Q. What happened to the Cadillac?

A. That was sold.

Q. What happened to the money from that?

A. It went into the Sheridan terminal.

Q. Well, now, when did all this happen? I thought the Sheridan terminal was paid for by the thousand dollars you put into it and the \$1,300 that

(Testimony of Vern Markee.)

you say you paid to Beverage & Hart and the \$1,300 or so charged against you on the company books. Now, did it cost that much more to build that terminal?

A. That Beverage & Hart deal you are referring to is on the coast terminal. [92]

Q. Oh, pardon me. This terminal at Sheridan cost \$8,000. So in addition to the money shown on the books charged against you and shown as going into the Sheridan terminal we have an additional six or eight hundred dollars of company funds that went into the Sheridan terminal, is that right?

A. Well, there is approximately a year there wasn't any rent paid on the Sheridan terminal too.

Q. I am not asking about that. This went into the building of the terminal? A. Yes.

Q. Now, when you left Rand Truck Line you took another Chevrolet along with you, didn't you?

A. Yes.

Q. And where did that car come from?

A. That was my own original property.

Q. How long had you had it?

A. About a year and a half.

Q. From whom did you buy it?

A. Either Smith or Fields in Portland.

Q. And how did you pay for it?

A. Paid for it with cash.

Q. How much cash? A. Around \$1,800.

Q. Where did you get the cash?

A. Do I have to answer all these questions? [93]

The Referee: Yes, you have to answer even that.

(Testimony of Vern Markee.)

A. I sold my house here in Portland.

Q. (By Mr. Bollenbeck): How much did you sell your house in Portland for? A. \$11,000.

Q. Did you put the money in a bank account?

A. After the mortgage was paid, yes, I put the balance that I had left in the bank account.

Q. How much was your mortgage?

A. I am not sure. I believe I realized about \$2,500 out of it.

Q. You realized after payment of the mortgage about \$2,500? A. Yes.

Q. What bank did you put the money in?

A. It was either the First National of Portland or at Sheridan.

Q. And out of that \$2,500 you paid how much for this Chevrolet?

A. Seventeen or eighteen hundred dollars.

Q. Where did you get the \$8,000 to build the Sheridan terminal?

A. Borrowed it from Mrs. Haas.

Q. Well, how much did you borrow from her?

A. Oh, I borrowed \$2,500 the first time and then two years later I borrowed about \$5,000.

Q. I am talking about the money to build it. Now, you didn't wait two years to build it.

A. Well, both terminals were built on the same deal. They were built 24 by 30 to start with and they were both enlarged. [94] This one, the building at Sheridan is now 26 by 118.

Q. In other words, you say that you borrowed

(Testimony of Vern Markee.)

\$2,500 from this Mrs. Haas—how do you spell her name? A. (Spelling) H-a-a-s.

Q. Where does she live?

A. She lives at Sheridan.

Q. What is her first name or initials?

A. L. Letitia. She is the one that owned the property.

Q. Letitia Haas? A. Yes.

Q. You borrowed \$2,500 from her first?

A. Yes.

Q. And when you enlarged the terminal you borrowed \$5,000 more from her?

A. I don't believe it is quite \$5,000.

Q. Did that \$5,000 include the original \$2,500?

A. No.

Q. How much of a mortgage is against it now besides Mr. Heider's mortgage?

A. I believe Mr. Heider's mortgage has been released.

Q. You mean this Rand Truck Line mortgage against your property has been released?

A. I believe that is right, Mr. Heider.

Mr. Heider: I think maybe it is part of the lease file on the real estate. [95]

Q. (By Mr. Bollenbeck): When was that filed, do you know, Mr. Markee?

A. I don't know whether it was filed or not. I know it was included in the mortgage and after the mortgage was paid off a little bit I believe Mr. Heider released it.

(Testimony of Vern Markee.)

Q. Did you pay him anything for the release of it? A. No, sir.

Q. How much of a mortgage has Mrs. Haas got against it? A. She has around \$4,000 now.

Q. Now, how much did you pay to Mr. Heider as a down payment upon your home? A. \$1,500.

Q. And you bought that at the time you were still with the Rand Truck Line? A. That is right.

Q. Where did you get that money?

A. The balance of what money I had left over selling the other place and I had some.

Q. That was approximately \$700. Where did you get the rest of it?

A. I had some money in the bank.

Q. What bank? A. Bank of Sheridan.

Q. About \$1,000?

A. I paid Mr. Heider \$1,500. [96]

Q. Well, you had \$500 left over from your house sale here in Portland, is that right? You had about \$1,000 in the bank? A. No, sir.

Q. Where did you have the money, where did you get the thousand dollars?

A. Well, I said I had some of it in the bank.

Q. Well, how much of it did you have in the bank?

A. Oh, I don't remember now. All I can remember is I paid him \$1,500.

Q. Well, I want to know where you got it.

A. Well, I earned it. That was three or four years ago. I sure didn't take it from Rand Truck Line, if that is what you are driving at.

(Testimony of Vern Markee.)

Q. Now, Mr. Markee, did you establish an account down at the North Lincoln Bank at Taft, Oregon? A. Yes.

Q. And that was in substance an account in Rand Truck Line's name and your name too?

A. Yes.

Q. And you could draw personal checks on that account? A. Yes.

Q. And Rand Truck Line could draw business checks on that account?

A. Just through the other office.

Q. Well, they could use that account to transmit funds to [97] Portland? A. That is right.

Q. And you could use it for your personal account, is that right? A. That is right.

Q. And Rand Truck Line money went into that account, didn't it? A. Yes.

Q. And did you put any money into it yourself?

A. Yes.

Q. Do you have the statements on those accounts?

A. No.

Q. Do you know where they are? A. No.

Q. Are you sure you didn't get this \$1,000 to pay or \$1,500 to pay Mr. Heider out of that account?

A. Yes, I am very sure.

Q. Well, what account did you get it out of?

A. I had some money of my own.

Q. Where? A. In the bank.

Q. What bank? A. The bank at Sheridan.

Q. Do you have your cancelled checks and bank statements? A. I have some of them, yes.

(Testimony of Vern Markee.)

Q. Can you produce them, produce this \$1,500 check that you paid [98] to Mr. Heider?

A. Yes, sir.

Mr. Bollenbeck: I would like to ask an order of the Court to produce that at the same time he produces that agreement.

A. That agreement is coming right up.

The Referee: Mr. Hickson is bringing that over.

Q. (By Mr. Bollenbeck): Now, what was the reason of mixing company funds and your personal funds down there in that North Lincoln Bank?

A. Well, it didn't make any difference. All the accounts that were down on the coast at the time I was down there I was responsible for and they were all paid.

Q. You mean the accounts payable?

A. The accounts payable.

Q. What about the accounts receivable?

A. Well, all the accounts receivable went into the checking account and all the freight bills were charged out against that division.

Q. As a matter of fact, Mr. Markee, when you left that division down there there were a lot of apparently uncollectible accounts receivable that had in fact been collected?

A. Definitely there were quite a number of them.

Q. And who was responsible for that condition?

A. The fellow that was down there before I went down there.

Q. Mr. Robinson?

A. That is right.

(Testimony of Vern Markee.)

Q. And were any of those during your time down there?

A. Every bill that was down there while I was down there was paid when I went out there.

Q. I am talking about your accounts receivable. Now, there were a lot of accounts receivable down there that the money never went into the company books.

A. That is right.

Q. And where did the money go that didn't go to the company?

A. Mr. Robinson had been down there and collected around \$4,000, if I remember.

Q. Did Mr. Robinson work for you down there, Rand Truck Line?

A. No, sir, he did not.

Q. Did he continue to work for you when you went down there?

A. He did not.

Q. Was there any money of Rand Truck Line during your stay down there that was diverted?

A. Definitely not.

Q. Was Robinson under bond at the time he was down there?

A. No.

Q. Didn't you have your employees under bond?

A. No, sir. To clear the record there, I was only down to the Coast myself for around twenty-five days.

The Referee: You have a right to explain any answers that [100] you want.

A. The reason I went down there is that this man went down and skipped out and left a mess and I went down and straightened it out, and before I left I put a responsible man in the position and set-

(Testimony of Vern Markee.)

tled up all the accounts that were charged out while I was down there taking care of that territory.

Q. (By Mr. Bollenbeck): Where did the bank statements and the cancelled checks from that joint account, yours and the Rand Truck Line, where did they go to?

A. I don't know. The Agent probably picked up some of them. I never got them.

Q. You mean you never got your personal cancelled checks back?

A. No. When I left there, why, when they had that fire at McMinnville, and I went back down to McMinnville and didn't get back out to the Coast until some time later.

Q. Did you take all of your personal money out of that account?

A. I didn't have any personal money in there at that time.

Q. Personal money of yours had gone through that account?

A. That is right.

Q. But at the time you left you didn't have any personal money in?

A. That is right. All I deposited in there was my pay checks.

Q. Who reconciled that account, who balanced it?

A. Mr. Taylor.

Q. How could it be balanced with your personal funds in there? [101]

A. That was simple. Everything that was down there was charged up to me and I paid for it.

(Testimony of Vern Markee.)

Q. When was this account in existence down there?

A. Just before the fire when the terminal burnt at McMinnvillle.

Q. Neither the Judge nor I know when that fire occurred. Can you tell us by calendar months and dates?

A. I believe it was in June, about 1946. I am not sure. Mr. Taylor can tell you.

Q. Was he with the company at that time?

A. No.

Q. So he wasn't with the company at the time this bank account was established and in existence?

A. No.

Q. And who did balance that bank account?

A. Mr. Taylor.

Q. Well, how long was it in existence?

A. Around twenty days or so.

Q. You mean you went down there and established a bank account for yourself and the company and put company money in it and put your money in it and closed the account out all in twenty days?

A. No, I didn't say it was closed out. It was used for about twenty days, and it wasn't closed out until some time later. When the terminal burned in McMinnvillle we forgot about everything else and when the agent took off, then, when the men took [102] over when I left, why, we started a different bank account. He wrote checks payable only to Rand Truck Line, McMinnvillle.

The Referee: Mr. Bollenbeck, Mr. Hickson is

(Testimony of Vern Markee.)

here now and he has that agreement if you want to look at it.

Mr. Bollenbeck: Yes, I would, yes.

Q. By this agreement, Mr. Markee, you were selling out the Markee Truck Line for \$9,000 and the Rand Truck Line agreed to pay your debts in the amount of about \$3,000 and issue you 25 shares of stock of par of \$100. I think that was what was really done, they really did issue you 500 shares of stock with a par of \$10. A. \$5,000.

Q. So they issued you \$5,000 worth of stock and \$3,000 they assumed your liability.

A. There is no consideration in there for any permits, which you was trying to get out of me awhile ago.

Q. Well, that was a part of the whole agreement, wasn't it, a transfer of the permits to them?

A. No, sir. There was no consideration in there in that \$9,000 for any permits.

Q. You have been talking to your lawyer about "no consideration," but it was a part of the whole deal that you were to assign the permits to them. It provides in here as a part of this sale "Sellers do hereby promise to sell and assign to the purchaser all PUC permits and Interstate Commerce permits for [103] the operation of trucks as common carriers." That was part of your agreement to assign and set over, and you further provide that if you cease to become a stockholder then at his request Rand Truck Line agrees to assign and set over said

(Testimony of Vern Markee.)

permits now owned by Rand Truck Line to the said Vern Markee.

A. That is right. That is the only way we would consider going into partnership with Bob Rand.

Q. Well, now, this agreement in addition provides, Mr. Markee, that as long as you are a stockholder of the Rand Truck Line that you do not engage in any business in competition with the Rand Truck Lines.

Mr. Hickson: Your Honor, I wonder if I could have an appearance in behalf of Mr. Markee. My name has been dragged in by counsel here.

The Referee: There is no need for an appearance. No issue before the Court. We are merely getting at the facts, Mr. Hickson. Mr. Markee has been brought in under subpoena under Section 21-a of the Bankruptcy Act and to be examined in regard to his transactions with the Rand Truck Line. There is no issue, nothing involved at this time except to get at the facts.

Mr. Hickson: May I suggest possibly the contract is the best evidence and should be shown to the witness.

The Referee: Well, I think that should be done.

Mr. Bollenbeck: Well, if there is any question as to whether [104] I was reading it correctly, I will be glad to.

The Referee: There is no issue at this time. We have asked him to produce the contract and we would like to have a copy of it in evidence. Introduce this but substitute a copy.

(Testimony of Vern Markee.)

Mr. Hickson: Your Honor, I will need that in another proceeding before the PUC, so I would like to have that, substitute a copy.

Mr. Tonkon: Just a minute. I suggest you have that marked and introduce it.

(Copy of contract between Mr. Markee and Mr. Rand, so produced, was thereupon marked Trustee's Exhibit 13.)

Q. (By Mr. Bollenbeck): Mr. Markee, when did you start operating down at Sheridan after you ceased taking an active part in the Rand Truck Line?

A. The permit was reinstated in August of 1947.

Q. When did you cease to be a stockholder of the Rand Truck Line?

A. The last of February, 1948.

Q. For a period of several months you were operating in competition with the Rand Truck Line and were still a stockholder of it, is that right?

A. Yes. I might add that anything we hauled could have been hauled by thirty or forty other carriers located here in the [105] City of Portland during that time. As far as that goes, it could have been hauled by any one of a hundred carriers within this vicinity.

Q. Now, Mr. Markee, do you know of a shipment that went to a Mr. Forrester down at Daleyville, Oklahoma?

A. Yes.

Q. Did you collect the money for that shipment?

A. Yes.

(Testimony of Vern Markee.)

Mr. Hickson: Mr. Referee, may I ask a question? I am wholly unfamiliar with your procedure, but it is perfectly obvious to me in the short time I have been here that Mr. Taylor here and counsel are trying to lay the grounds for a damage suit that is pending out at McMinnville against Mr. Markee. It hasn't anything to do with this case.

The Referee: Any transaction of this man with the corporation is relevant here. That is all I want, and he is not entitled even to counsel.

Mr. Hickson: That is all I wanted to know.

The Referee: All we do is get at the facts.

Mr. Hickson: I just wanted that in the record.

The Referee: If there is any issue brought up later, why, the matter can be gone into at that time.

Q. (By Mr. Bollenbeck): Now, that shipment to Oklahoma was handled through the Rand Truck Line, was it not? A. Yes. [106]

Q. And you collected the money for the entire shipment? A. Yes.

Q. Still have retained it? A. That is right.

Q. I understand you refuse to pay it over to the Rand Truck Line?

A. I didn't refuse to pay it. I will pay it if they will render a statement just like any other business house instead of hitting me up on the street for it.

Q. Who hit you up?

A. Who do you suppose? Mr. Taylor.

Q. As a matter of fact Clayton Markee asked you for it?

A. Clayton Markee has asked me for it.

(Testimony of Vern Markee.)

Q. If we submit you a statement will you pay the same?

A. The money is in the bank waiting for a statement. If you get it in before the 10th it will be paid on the 10th.

The Referee: Anything else now?

A. I would like to add here too that there is plenty of business in this territory between here and the Coast for two or three truck lines, but it seemed that Rand Truck Line owned it all and nobody else had any rights down there to haul anything, and instead of them getting all, why, they come out on the short end of it, and they are trying to blame me for it. We have never solicited any business any time we have been in business down there. We haven't had to. We have had more than [107] we can take care of. And I don't want to take the blame for somebody's bull-headedness.

The Referee: Have you any other questions?

Mr. Bollenbeck: I think that is all.

The Referee: All right, Mr. Markee. Thank you very much.

Mr. Bollenbeck: The Court indicated earlier in the day that they were going to adjourn this meeting.

The Referee: Well, now, what else do you want?

Mr. Bollenbeck: There were some bank statements, your Honor.

The Referee: No, there was only a cancelled check that he was going to show that he paid to Mr.

(Testimony of Vern Markee.)

Heider for the purchase of his property. That was the only other thing, wasn't it?

Mr. Heider: If the Court please, I will verify what Mr. Markee said about that. That was right. He paid me \$1,500 down on the place. I know that is what the check would show if it was produced here. Since he mentioned it I am certain that is what it was. And the figures he give on the place, as you say, he was doing the paying there and they are more accurate than my figures. I am sure they are.

Mr. Bollenbeck: I have no special desire to have it continued, your Honor.

The Referee: All right, I will not continue it at this time. I think if we should want any further information Mr. Markee will probably come voluntarily, won't you, Mr. Markee? [108]

A. Yes, sir.

The Referee: Thank you. Then, this matter will be adjourned and you will proceed to prepare the order for the sale of the assets free from liens.

(Witness excused.)

Mr. Bollenbeck: There is one question, your Honor. It just occurred to me that I would like to ask Mr. Markee—I don't know—Mr. Markee, are you attempting to negotiate the purchase of the mortgage on the Delake terminal?

Mr. Markee: No.

The Referee: That is all.

(Hearing adjourned.) [109]

Certificate

I, Glenn G. Foster, hereby certify that on Wednesday, July 6, 1949, I reported in shorthand certain testimony and proceedings had in the above-entitled cause; that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 109 pages, numbered 1 to 109, both inclusive, constitutes a full, true and accurate transcript of said testimony and proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 28th day of July, A.D. 1949.

/s/ GLENN G. FOSTER,
Court Reporter.

[Endorsed]: Filed July 28, 1949, Referee.

[Endorsed]: Filed October 23, 1956, U.S.D.C.

March 14, 1956, 10:00 A.M.

The Referee: This matter comes on upon the objections to the claim of Otto Heider. I believe it was originally set for hearing February 28, 1956, at 2:00 p.m., and by the consent of counsel it was continued to be heard at this time and date.

Mr. Dougherty: May the record show on behalf of the Creditor Otto W. Heider, we would like to submit at this time a motion to dismiss, on the ground that the controversy involved here has, by authority of the Referee, been submitted to the Circuit Court of the State of Oregon for Multnomah

County, and is now pending. It is our understanding that the complete controversy was submitted to that court, and thereby this Court deprived itself of jurisdiction in the matter.

We move for dismissal of the objections on this added ground: A prior hearing in this matter was held, I believe in June of 1949——

Mr. Miller: July 6, 1949.

Mr. Dougherty: We are now nearly seven years after that time. At that time the Referee stated that if the Trustee had [2*] any objections to the claim that the Trustee would file such objections. They were not, as a matter of fact, filed for nearly seven years after that. Accordingly, I believe there's been undue laches, which has had a very material adverse effect upon the creditor, and that the stale objections should not now be heard.

Mr. Miller: If the Court please, we haven't read this motion to dismiss ourselves, your Honor, but I think it goes without saying that this Court can never rob itself of jurisdiction under 57 of the Bankruptcy Act, to hear a claim.

There is a possibility that there are questions in the Circuit Court matter, some of which this Court would never have had jurisdiction over. Notwithstanding that, however, and even if it were possible for the Court to rob itself of jurisdiction here, which I don't believe is possible under the Bankruptcy Act, the proceeding over there has never come to trial; there is no adjudication over there, and hence

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

the matter certainly isn't *res judicata*, or anything like that, and I think that the Court, at any time prior to a judgment over there, would retain jurisdiction to hear those matters which are designated to this Court by the Bankruptcy Act, and that is all that is here.

Now, with regard to the time elapsed, there is nothing in the Bankruptcy Act which says when a bankrupt may file objections. He may file objections at any time before closing of a case, and without taking a lot of time I will say if there has [3] been delay here, the record in the Circuit Court will show the delay has been as much on the part of the Claimant as of the Trustee. The great length of time between the pleadings due over there and the time within which they were filed will take many years. I don't think he is in good faith here when he talks about laches.

Mr. Dougherty: If the Referee please, I would like to take exception to counsel's comment. In the first place, the counsel who made the comments doesn't have knowledge in the matter, and in the second place, it is true that counsel for the Trustee was required to file, I believe, five different complaints, many of which were found to be insufficient upon demurrer, by the Court, and the last thing that happened was in October of last year, when the Trustee's demurrer to our affirmative answer in that proceeding was overruled. Since that time my file indicates that the Trustee has not taken action.

This identical question was presented to the Circuit Court on that demurrer, the question being

whether or not the entire controversy had been submitted to that court, and the judge, by his ruling and by his comments from the bench, indicated that he considered that it had. It may be as a technical matter that this Court retains jurisdiction. I don't believe that it does, but even assuming that it does, I think as a matter of comity between courts this Court should not exercise any jurisdiction while the matter is still pending before the [4] Circuit Court, and I believe there is no question that identical issues are involved even though the proceeding in the Circuit Court involves other parties and additional issues.

Mr. Bollenbeck: Now, if the Court please, I would like to answer counsel. The demurrer was sustained—or overruled, rather, by Judge Dobson in the Circuit Court. One of the things that was not before the Court at that time was that Otto Heider had filed a claim here. That was not in the complaint, it was not in the answer—I mean it was not in the demurrer. I demurred to the affirmative counterclaim and there was no allegation in the counterclaim that this claim had been filed by Otto Heider. It was, therefore, not in the record that he had submitted to this Court's jurisdiction first. The case is now pending over there on a plea in abatement to the counterclaim, in which plea in abatement I did set up that this claim had been filed in this Court.

In other words, if there is a conflict in jurisdiction it is a conflict that is created by Mr. Heider's own act. He submitted to this jurisdiction, to this Court, and then attempted to raise the same issue over

there, and as I said, the demurrer did not and could not show that this claim had been filed. The plea in abatement does show that this claim had been filed.

Now, the issues are these: The pleadings are different and the dates are different. It is an entirely different question [5] over there, and at that time I briefed the law, and the law, I think, is plain that this Court, even with the Referee's consent and everybody's consent, cannot release its jurisdiction. This is the only court that can determine how the assets in its possession are to be disbursed. The state courts have concurrent jurisdiction in the collection of assets, which is what that case is about. This is the reverse of the picture, a picture on the distribution of the assets, that the Court has in its possession now.

The Referee: Let me clear up one question in the record. Mr. Dougherty spoke of a hearing on this matter in July of 1946. That was——

Mr. Miller: 1949, your Honor.

The Referee: 1949? What was the nature of that hearing? Was that an examination——

Mr. Bollenbeck: That was an examination of Mr. Heider and Mr. Vern Markee, and it involved much more than is here.

The Referee: Under Section 21-a of the Bankruptcy Act.

Mr. Dougherty: If the Court please, reading from the transcript, your Honor at that time said, "We expect to sell it" (meaning the property on which Mr. Heider had liens, and he has turned over those evidences of title)—"We expect to sell it for

considerably more than the amount you claim, and the matter of determining the validity and amount of your lien will be taken up and if the Trustees have any objections to it you will [6] be served with the objections and then there will be a further hearing on it." Those objections weren't filed for over 6 years later.

The Referee: Well, I think that is due to the fact that in the state court where the issues are enlarged, they were weighing whether they could determine in the state court, but this court is not accustomed to waiting 6, 7, and 10 years to get things determined. The purpose of the Bankruptcy Act is to liquidate the assets as quickly as possible and see that they are paid to the creditors according to the equities of the case and pro rata to the general creditors. I think Mr. Heider is just as anxious as the rest of us to try to get this matter determined once and for all. The only matter before this Court is the validity of his claim and the mortgage securing his alleged claim. I don't think this Court can relinquish paramount jurisdiction to determine that matter.

I suggest that we proceed and see if it can be determined at this time. Mr. Heider has the right of review. It can be quickly granted to him if he should not be satisfied with the Referee's determination, so you may proceed.

Mr. Bollenbeck: Do I understand it is the Trustee's duty to go forward first?

The Referee: That's right.

Mr. Miller: If the Court please, in the interest of

conservation of time, if the examination of July 6, 1949, of Mr. Heider [7] is not deemed part of the record in this case, we would ask that it be deemed part of the record of this hearing.

The Referee: You mean the examination?

Mr. Miller: The examination of Mr. Heider. It would save a lot of time going over the same matters that were gone into on that date.

Mr. Dougherty: It is my understanding, your Honor, that it was a part of the record.

The Referee: You stipulate that it may be made a part of the record in this hearing?

Mr. Dougherty: Yes.

Mr. Bollenbeck: Call Mr. Rand, please.

The Referee: Mr. Rand, will you come around here, please? Your full name, please.

Robert R. Rand: My full name is Robert Roy Rand.

ROBERT R. RAND

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bollenbeck:

Q. Mr. Rand, at one time you and your wife were majority stockholders in the Rand Truck Line, were you not? A. Yes, sir.

Q. And what percentage of the stock did you own, do you remember?

A. Repeat the question.

(Testimony of Robert R. Rand.)

Q. What percentage of the stock did you own, do you remember? A. Eighty per cent.

Q. And who owned the rest of it at that time?

A. At the time we sold out?

Q. Yes. A. Mae Potts.

Q. Who was Mae Potts?

A. A sister-in-law.

Q. Now, did Vern Markee become a minority stockholder in your corporation shortly before you sold out? A. Yes, he did.

Q. And did you and he conduct negotiations for the purchase of your stock and Mrs. Potts' stock?

A. Yes, he did.

Q. And did you arrive at a deal?

A. Yes, we did.

Q. And what was that deal?

A. He was to pay me for the 80 per cent, after Vern became a third partner, or a third stockholder in the corporation—and he agreed to purchase all of the stock that we owned, both myself and Mrs. Potts.

Q. And how much money was he going to pay for it?

A. He was going to pay \$40,000 for it. [9]

Q. And did he have \$40,000?

A. I wouldn't know.

Q. Well, did you discuss the financing arrangements with him as to how this forty thousand was to be paid? A. Yes.

Q. And what decision did you arrive at, or what action did you take?

(Testimony of Robert R. Rand.)

A. He was going to finance it and pay me in a way that would be satisfactory to me.

Q. And how was he going to finance it, or how did he finance it?

A. Well, he borrowed the money and paid me.

Q. From whom did he borrow the money?

A. He borrowed the money from Otto Heider.

Q. When did Otto Heider first appear in the picture in this transaction?

A. At the time of the negotiations. I don't remember the exact day or anything, but he was a party to the negotiations. He had to O.K. the payment of the money.

Q. Was it before the deal was closed?

A. Well, no. Vern and I closed the deal.

Q. Well, was it before the papers were signed on the deal?

A. Of course it would have to be. The finances were arranged before the deal was closed.

Q. And did Mr. Heider know what the deal was?

A. I am quite sure he was familiar with it. [10]

Q. And Vern was buying your stock?

A. I am quite sure he was familiar with it. I can't say for sure.

Q. And did you and Vern discuss it in his presence?

A. I don't think ever; I don't think ever the three of us met at any one time.

Q. Do you know where the papers were prepared, the mortgages and so forth?

(Testimony of Robert R. Rand.)

A. Well, there never was any papers prepared, actually excepting a contract.

Q. Who prepared the contract, do you know?

A. Otto Heider's office.

Q. Otto Heider's office. When was that? What was the contract for?

A. For the payment of the money.

Q. Between you and Otto Heider?

A. No, between Vern and I. Otto Heider had nothing to do whatever with the negotiations. He was purely and simply—it was through his organization that the thing was financed, but personally Otto Heider had nothing to do with it.

Q. Yes, but did he represent either you or Mr. Markee in this transaction?

A. You mean as a legal attorney?

Q. Yes.

A. No, it wasn't necessary. We needed no advice or attorney to handle the negotiations. [11]

Q. Now how were you paid, Mr. Rand? I mean how much, if any, cash did you receive?

A. I received \$8,000 in cash and the balance on a contract.

Q. You received \$8,000 in cash at the time the deal was closed?

A. I don't remember any more just when I received it but I am sure that I would have received it at that time.

Q. And the balance was paid in payments of \$500, wasn't it?

A. Five hundred dollars a week, yes, sir.

(Testimony of Robert R. Rand.)

Q. Five hundred dollars a week—\$32,000 was paid in that fashion? A. Plus interest.

Q. And Mr. Heider paid you some interest on that payment that was made?

A. Yes, he did.

Q. I want you to look over these checks, Mr. Rand, and I'll ask you whether those are the checks—I don't think you got all of them, but will you look over those checks and see whether those are the checks that Mr. Heider issued to you?

A. (Examining checks): This check doesn't have my signature.

Mr. Bollenback: He is referring now to a check dated November 2, 1945, in the amount of \$5,000, signed by Otto Heider, payable to Vern Markee and the Rand Truck Line.

A. Here is also another one, but I think there must be a slip-up on this, but it doesn't have my signature on it.

Mr. Bollenback: He refers now to a check dated——

Q. Well, the check is payable to you, Mr. Rand, and to your wife. [12]

A. Well, the bank shouldn't have cashed it in that way. It was endorsed by neither one of us.

Mr. Bollenback: For the record, this check is dated December 2, 1944, payable to R. R. Rand and/or Goldie I. Rand, \$500. It has a penciled notation on the front, "Ind. missing," and on the back it says: "Placed to the credit of within named

(Testimony of Robert R. Rand.)

payee. Endorsement guaranteed. The First National Bank."

A. Well, that apparently clears it up. Those two checks I don't recognize. The others I think were the original checks that I endorsed and received in payment.

Q. Will you count them, Mr. Rand? They are all \$500, aren't they, except the interest checks?

A. I didn't check that.

Q. Eliminating the interest checks, count and see how many there are.

A. (Counting): Sixty-three, I count.

Q. That would be \$31,500?

A. Unless I overlooked one.

Q. Actually that is my count too, Mr. Rand.

A. Well, I believe that——

Mr. Dougherty: Will counsel extend me the courtesy——

Mr. Bollenback: Yes, I was just going to put a rubber band around them.

Mr. Miller: If the Court please, while Mr. Dougherty is looking at that, I just handed him a supplemental objection. I apologize [13] for the lateness, but it doesn't change any of the facts.

Mr. Dougherty: We will object to its being received at this time.

The Court: We will go into that later.

Q. (By Mr. Bollenback): Mr. Rand, what did the corporation receive in return for the execution of this note and mortgage?

Mr. Dougherty: If he knows of his own personal

(Testimony of Robert R. Rand.)

knowledge. A. The question again, please?

Q. What did the corporation receive in return for the execution to you and your wife of this note and mortgage in the amount of \$43,560?

A. I don't know. I don't understand it. I don't understand what note you refer to.

Q. Well, I will hand you Trustee's Exhibit 3, which is a promissory note signed by the Rand Truck Line, Inc., payable to Mrs. R. R. Rand, in the amount of \$43,560, and ask you what you gave the corporation in return for that note and the mortgage that secured it?

A. I didn't sign this note and I can not—it is unfamiliar to me. I never saw the note before, as far as I know.

Q. You never saw the note before?

A. I never saw the note before as far as I know. As far as I can remember I have never seen the note before.

Q. Did you and your wife discuss this transaction? A. Yes, we did. [14]

Q. Can you tell me why she endorsed this note "Without recourse or liability?"

A. Well, the only reason that she would have the authority to do it was that she was secretary of the Rand Truck Line and she would have authority to do it.

Q. Mr. Rand, maybe you misunderstand the situation. This is a note and mortgage that was given to you and your wife personally, not to the corporation.

(Testimony of Robert R. Rand.)

Mr. Dougherty: I object to the form of the question. The note shows on its face that it wasn't given to this witness.

The Referee: Has that note been received in evidence?

Mr. Bollenback: It was received at the other hearing, your Honor.

Q. Well, Mr. Rand, let me ask you this: Was there any discussion between you and the other parties as to whether this should be payable to you or to your wife? A. No.

Q. There wasn't? A. No.

Q. I am going to hand you Trustee's Exhibit 6, together with a carbon copy of it, and ask you whether or not the title "Mrs" wasn't inserted after the mortgage was typed up. I refer to this line, right here (pointing), about the seventh line down.

A. The only excuse I could offer for that, I went on a hunting trip and I told Mrs. Rand at the time that I left, if it was [15] necessary to sign any papers that she could go ahead and sign them, and this might have happened at the time I was on the hunting trip.

Q. Then it was contemplated that this originally was to be payable to you, is that right?

A. To either one of us.

Q. To either one of you?

A. To any one of the stockholders of the corporation. It was actually paid to each stockholder and divided.

(Testimony of Robert R. Rand.)

Q. Now, can you tell me why this endorsement is on here, "Without Recourse or Liability?"

A. I don't know. This is Mrs. Rand's signature.

Q. It is her signature?

A. It is her signature.

Q. And to your knowledge you never saw that note before?

A. I don't recognize this note. I am sure I have never seen this note before.

Q. Well, now I am going to ask you again what did the corporation get in return for executing a mortgage payable to your wife—you say you are fully familiar with the situation—payable to your wife?

A. No, I didn't make a statement I was fully familiar.

Q. Well, you said the transaction contemplated that the mortgage was to be delivered to you.

A. No, I said there was never any mortgage. The thing was sold [16] on a contract. This document, I don't think was ever in my possession. As far as I know it was never in my possession. I held the stock of the corporation until each one of these checks was cashed and that was all the security that I needed. I held in my possession the stock of the entire corporation until such time as the last one of these checks was cashed and cleared the bank.

The Referee: You are referring to Mr. Heider's checks? A. Yes.

Q. Now, Mr. Rand, referring to trustee

(Testimony of Robert R. Rand.)

Exhibit 7, which is the minutes of the corporation, and I refer you to a stockholders' and directors' meeting held September 28, 1944, in which it is recited that you, your wife, Vern Markee, Florence Markee and Loren Markee were present. Do you remember that transaction, or that stockholders meeting?

A. No, I can't remember the details. I can't remember it.

Q. All right. I am going to refer you to the second page of the minutes of that meeting, the last full paragraph, in which it says: "It was moved and seconded that the president and secretary of the Rand Truck Line, Inc., together with the vice-president, borrow from Callie B. Heider, on assignment from Mrs. R. R. Rand, the sum of \$43,560.00, payable principal and interest in the sum of \$1,000.00 each and every month, beginning November 1, 1944, until the full amount due on said loan has been fully paid, and said three principal officers of the said [17] corporation are authorized to execute any documents, mortgages, notes, assignments, transfer of the property, assets, rights, stock, and all other interest of the said corporation, and which mortgage and pledge to remain in full force and effect until said borrowings have been fully liquidated."

A. No, I don't remember it. Twelve years is a long time to remember all the details. There's been a lot of water under the bridge.

Q. Was that money that Mr. Heider paid to

(Testimony of Robert R. Rand.)

you, that \$32,000, you say? Was that what was received for the execution of this mortgage?

A. No, there was \$40,000 received.

Q. Well, then, \$40,000, the money that you got for this stock, was what was given for that mortgage, is that right?

A. Well, that satisfied my claim to all the stock.

Q. Now in addition did the corporation receive anything for that mortgage?

A. Well, after I ceased to be president of the corporation I couldn't answer that. While I was president of the corporation, no.

Q. Did you discuss this mortgage with Mr. Heider and Mr. Markee?

A. No, I actually didn't ever know there was a mortgage existed.

Q. Do you remember going to that directors' meeting when you were all supposed to be present?

A. No, I don't.

Q. Do you know whether it was actually held or not? [18]

A. It would be difficult for me follow through all the details of that transaction. I couldn't say. I wouldn't want to say "yes" or "no." I would just rather leave it. Twelve years is a long time.

Q. Well, let's put it this way. As far as you know the corporation received nothing in return for giving this mortgage, is that right?

A. No, I couldn't say that.

Q. Well, what did it receive?

(Testimony of Robert R. Rand.)

A. Well, as far as I know, as I already stated, I don't recognize that note and mortgage.

Q. Well, was there some other contract in existence?

A. I wouldn't say I never had it because I handled a lot of money, and a lot of papers on the various deals. As long as the matter was closed, I proceeded to forget it, because I had a lot of other things to think about, but to the best of my knowledge I never remember of seeing that note. I couldn't say I never saw that note but I don't remember seeing that note, but it could be possible that it was in existence and that I held it. I wouldn't say that I didn't.

Q. Have you had very many transactions of this size in your life, Mr. Rand, involving yourself personally?

A. Well, quite a lot. This was about the largest I have had but I have handled many 25—and \$30,000 transactions, and I have been used to handling considerable money all my life. [19]

Q. You knew what the sense of an endorsement, "Without liability" would be, then, did you not?

A. No, I don't know.

Mr. Dougherty: If the Court please, I object to it. This witness did not make the endorsement. He is being asked about a third person's endorsement and asked to guess what might have occasioned it.

Mr. Bollenback: I am not asking that. I am just asking him if he knew then.

A. No, I don't know.

(Testimony of Robert R. Rand.)

Q. You don't know?

A. It would be absolutely void, according to what Webster's dictionary would say about it. It would be void.

Mr. Bollenback: For the present we have no further questions, your Honor. I would like to keep the witness here, though.

Cross-Examination

By Mr. Dougherty:

Q. Mr. Rand, what was the condition of the Rand Truck Line when you sold your interest to the Markees? Was it solvent? A. Yes, it was.

Q. Was it on a cash basis?

A. It was entirely on a cash basis. It had no obligations or judgments or any claims against it that I know of, other than the current bills.

Q. This matter of financing between the Markees and Mr. Heider, [20] you knew that there was some financing arrangement?

A. I knew that, yes, sir.

Q. Did you know the details of it?

A. No, I did not. It was of no interest to me as long as I received my money for my stock. I had no further interest, except we remained friendly with them and wished them a great deal of success in the operation of the business.

Q. Do you know whether or not the business continued in a good solvent state for some time?

Mr. Bollenback: I am going to object to that.

(Testimony of Robert R. Rand.)

The witness severed his connections. He has no knowledge.

Mr. Dougherty: I asked him if he knew.

The Referee: He may answer if he knew.

A. I knew nothing about it whatever. I lost contact completely with the organization.

Mr. Dougherty: No further inquiries.

The Referee: Do you have something?

Mr. Bollenback: I don't think so but I would like to ask the witness to remain in the courtroom.

The Referee: May I ask one question? You mentioned that Mr. Heider prepared a contract between you and Vern Markee, whereby you agreed to sell and he agreed to purchase your stock in the Rand Truck Line. Was there such a contract?

A. I can't tell you whether there was, other than a verbal contract, or not. I can't tell you whether there was a written [21] contract or not because I held the checks and I held the stock and I had ample security for money owed to me and that was the main thing I was interested in, and I can't say whether there was any written contract or not.

The Referee: You don't have any such contract in your possession?

A. No, I don't. I don't have any of the papers at all.

Mr. Dougherty: May I ask one or two further questions, your Honor?

(Testimony of Robert R. Rand.)

Further Cross-Examination

By Mr. Dougherty:

Q. Mr. Rand, of course this was a corporation, but you mentioned when Mr. Markee became one of the partners.

A. Well, I meant a stockholder in the corporation. I wish to correct that.

Q. But, in fact, in your operations did you conduct it as a——

Mr. Bollenback (Interrupting): I object to that, your Honor. That isn't proper. It was, in fact, a corporation, and if they conducted it as a partnership it just meant it wasn't operated properly.

Mr. Dougherty: That is a conclusion. I think that the circumstances of how the business was conducted and how it was considered by the owners is of considerable importance.

The Referee: Who was the stockholder you were referring to?

Mr. Dougherty: Mr. Rand, I believe, testified that Mr. Markee [22] acquired an interest, and just as a manner of speaking, I believe Mr. Rand said "when he became one of the partners."

The Referee: How long had he been in there before you sold out.

A. About twenty-three years.

The Referee: Markee had?

A. No, no, no. No, Markee had——

(Testimony of Robert R. Rand.)

The Referee: Well, how long had Markee been in there before you sold out?

A. I couldn't say; just a matter of months.

The Referee: Well, if you want an answer he may answer.

Q. (By Mr. Dougherty): Did you run your business, Mr. Rand, generally as any closely held business is run?

Mr. Bollenback: Oh, if your Honor please, that is a different question entirely. That isn't the question he asked. That is calling for a conclusion and calling for everything else. How does this witness know how "any closely held business is run?"

The Referee: Well, I don't think it is going to be very relevant, one way or the other. Mr. Markee had been in only a few months, and before that, as I understand, Mr. Rand and his sister-in-law were the sole owners of the corporation, is that right?

A. Well, Mrs. Rand, myself and Mrs. Potts held all of the stock.

The Referee: Was she your sister-in-law, Mrs. Potts—did I understand that correctly? [23]

A. She was the wife of a former partner, when I operated it as a partnership, and he died and she inherited his interest in the truck line.

The Referee: I got the impression she was a relative of yours. Am I mistaken?

A. Yes, that's right. It was all in the family.

The Referee: Mr. Dougherty, you had better repeat your question if you want it answered.

(Testimony of Robert R. Rand.)

Mr. Dougherty: Let me ask another question, if I may.

Q. When you sold out, Mr. Rand, did you consider that you were selling out all of the assets of the business? Were you selling the business as a whole to the Markees?

A. I was selling the entire stock in the corporation, which would include all the assets.

The Referee: You held the stock until you got all of your money, didn't you?

A. Yes, I did.

Mr. Bollenback: Are you through, your Honor?

Mr. Rand, since you have been on the stand we have been in touch with Mrs. Rand and she has agreed to come in here this afternoon but she wants you to go out and pick her up. Will you do that and be down here for this afternoon's hearing? I thought that you knew all about this transaction. Of course, technically it is her signature, so as I say, we have asked her to come down, and will you go and pick her up? [24]

Mr. Rand: Well, if the Court would request me and would feel that it was absolutely necessary I would say I would, but I would rather not because Mrs. Rand isn't well. She has high blood pressure and she isn't in a condition to appear here for questioning, but if it is absolutely compulsory it could be done. I don't think—well, it is not my opinion at all. I am speaking out of turn.

Mr. Bollenback: No, you aren't speaking out of turn, because our situation is this, Mr. Rand. As I say, I felt you knew about this transaction and

(Testimony of Robert R. Rand.)

you say now you didn't, and it is her signature and of course, if we are forced to we can subpoena her as we did you.

Mr. Rand: I have already made my statement. If the Court feels it is necessary that she be brought in as a witness, I will.

Mr. Dougherty: If the Court please, the document shows on its face that it was issued to Mrs. Rand, and Mrs. Rand signed it, and counsel has assumed that Mr. Rand might know about it. He had no basis for that assumption. The matter has been going on for some seven years. He has had adequate time to prepare it. I don't know that it is of any particular materiality to Mr. Heider, but I don't see why last-minute subpoenas should be issued in the middle of the examination.

The Referee: This note was made to Mrs. Rand. Was the mortgage made to Mrs. Rand?

Mr. Bollenback: Your Honor, it is apparent on the face of it [25] that this document originally was prepared to be given to Mr. Rand, and you will note particularly on the first mortgage, the title "Mrs." is inserted. You can see on the front page of the mortgage, toward the top, there is even a diagonal bar put in and the "Mrs." inserted, so the transaction was, in fact, supposed to be one with Mr. Rand, but——

The Referee: Well, who assigned the mortgage to Mr. Heider?

Mr. Bollenback: Well, the note is assigned by Mrs. Rand, so I assume she did.

(Testimony of Robert R. Rand.)

The Referee: I thought we might hurry it up if Mr. Rand may have joined in the assignment of the mortgage. It was assigned, wasn't it, Mr. Dougherty?

Mr. Dougherty: Yes, sir.

The Referee: Well, this Exhibit 6, previously received—was that the original mortgage?

Mr. Bollenback: I think that is a copy, your Honor. Well, that is the first mortgage. It might be a duplicate original.

The Referee: Couldn't we have the original mortgage introduced in evidence? To support Mr. Heider's claim it should be in.

Mr. Bollenback: Technically his claim is on the second mortgage, your Honor, but the first mortgage is directly involved because it was never paid in full.

Mr. Miller: Mark these Trustee's Exhibits 14 and 15.

(Thereupon, a sheaf of papers headed "Schedule 100. Comparative Balance Sheet Statement" was marked [26] for identification Trustee's Exhibit No. 14. A certified photostatic copy of the Articles of Incorporation of Rand Truck Line, Inc. was marked for identification Trustee's Exhibit No. 15.)

The Referee: Do you think it is attached to the claim, Mr. Heider?

Mr. Heider: I thought it was attached to the claim, your Honor.

(Testimony of Robert R. Rand.)

Mr. Bollenback: I think that is the second mortgage that is attached to the claim, your Honor. Claim No. 63. It is filed numerically.

Well, Mr. Rand, getting back to the presence of Mrs. Rand here, unless you agree to have her present in court this afternoon it will be necessary for us to cause a subpoena to be issued.

Mr. Rand: Well, I wouldn't be a party to making that necessary. I will co-operate as far as I can.

Mr. Bollenback: Will you agree to have her here? We will try to not upset her, but will you agree to have her here at the commencement of the afternoon hearing?

Mr. Rand: Uh huh.

Mr. Dougherty: We renew our objections, your Honor.

The Referee: Objections to what?

Mr. Dougherty: Objection to calling the witness at this late date. There is a perfectly orderly procedure for subpoenaing [27] witnesses, and when the documentary evidence is as clear as it is here there is no reason for the witness not being called in long ago.

Mr. Bollenback: I am sure Mr. Dougherty objects to this entire transaction.

You are excused, Mr. Rand. Take a seat over here.

(Witness excused.)

Mr. Bollenback: At this time, your Honor, I would like to offer into evidence Trustee's Exhibit

14 for identification, which appears to be photostatic copies of balance sheets of the corporation filed with the Public Utilities Commission of the State of Oregon for the years 1944, '45, '46, '47 and '48.

Mr. Dougherty: We have no objection to Trustee's Exhibit No. 14 being received, subject to this comment: These documents are not, I believe, self-explanatory. Accordingly, we are willing to agree that they are photostatic copies of the balance sheets which were filed; whether or not they are correct, whether or not they were self-explanatory, we doubt. I would invite the Court's attention to the fact, however, that they show an excess of current assets over current liabilities for the time here involved.

Mr. Bollenback: The only comment I have on that is that the record already in evidence on that transaction was that this mortgage involved was never set up on the books, for about three years. [28]

The Referee: It may be received.

Mr. Bollenback: Now at this time I wish to offer Trustee's Exhibit 15 for identification, which purports to be a photostatic copy obtained from the Corporation Commissioner of the Articles of Incorporation of the Rand Truck Line.

Mr. Dougherty: No objection.

The Referee: It may be received.

(Thereupon, the documents heretofore marked Trustee's Exhibit No. 14 and Trustee's Exhibit

No. 15, respectively were marked as received in evidence.)

Mr. Bollenback: Call Vern Markee.

The Referee: Your name is Vern Markee?

Vern Markee: Yes, sir.

VERN MARKEE

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bollenback:

Q. Mr. Markee, it is a fact, is it not, that on or about December 27, 1943 you bought 500 shares of corporate stock of the Rand Truck Line, and in return for that you turned in certain equipment that you had owned? Is that right. A. Yes.

Q. And subsequently during the year 1945 you negotiated for the outstanding stock which was held by Mrs. Potts and the Rands, is that correct?

A. Yes, that's right. [29]

The Referee: Is that '45 or '44?

Mr. Bollenback: Pardon me. It was '44, wasn't it? A. Yes.

Q. And did you agree to pay the Rands \$40,000 for that stock, is that correct? A. Yes.

Q. How were you going to pay for that stock? (Pause.) Let me rephrase my question. When did you first talk to Mr. Heider about this deal?

(Testimony of Vern Markee.)

A. After we had made arrangements with Bob Rand to buy out his interest.

Q. Buy his stock? A. Yes.

Q. It was before the deal was closed?

A. Yes.

Q. And was Heider going to furnish the money to pay for the stock? A. Yes.

Q. And did Mr. Heider know what the transaction was—that it was a purchase of the corporate stock from Rand? A. I believe so, yes.

Q. Well, you explained the deal to him when you went down there, didn't you?

A. Yes, I told him we were buying the stock.

Q. Now Loren Markee, your brother, did furnish \$5,000 of the money, didn't he? [30]

A. That's right.

Q. Mr. Rand has testified that he got \$8,000 at the time the deal was closed. Where did the other three come from?

A. As to that, I can't say. I don't know.

Q. Did you furnish it? A. No, sir.

Q. You didn't put any money up at that time, did you? A. No.

Q. And who else would be interestd in putting money up beside you and Loren? A. No one.

Q. Well, did Otto Heider put this three thousand up? A. I don't know.

Q. Did the corporation pay any money to Bob Rand and Potts? A. No, not that I know of.

Q. Now the payments that were made on this first mortgage, those payments were made from cor-

(Testimony of Vern Markee.)

porate funds, were they not? A. Yes.

Q. A part of which went through the books of the corporation and part did not, is that correct?

A. That's right.

Q. Part of which was paid to Mr. Heider by cash and part by corporate check, is that right?

A. That's right.

Q. Was Otto Heider ever your attorney? Did he ever handle any [31] legal work for you?

A. Not that I know of.

Q. Now, Mr. Markee, going to a different field, I have a note and mortgage here—I thought it was marked but it isn't—a mortgage from you to the Rand Truck Line, in the amount of \$5,000—for \$5,400, rather, and covering a wood van body with a 3-speed Brownie with 5 speeds. Do you know what that piece of equipment was? (Pause) And a note payable to the Rand Truck Line, signed by you, which was endorsed. Do you remember that transaction? That was turned over to Otto Heider?

Mr. Dougherty: May I inquire who is doing the testifying here?

Mr. Bollenback: You may inquire.

Mr. Dougherty: Three questions have been asked the witness and he hasn't been given an opportunity to answer any of them.

A. This particular piece of equipment is a Sterling truck and van body used by the Rand Truck Lines, but I don't follow exactly what happened here.

Q. (By Mr. Bollenback): Well, I am going to

(Testimony of Vern Markee.)

ask you to remember at that time whether or not you borrowed any money from Otto Heider?

A. Yes.

Q. And do you remember how much you borrowed from him?

A. According to this note it was \$5,400.

Mr. Bollenback: I think probably that should be marked. I [32] thought it was marked at a previous hearing, but apparently it wasn't.

Q. I am going to hand you a check for \$5,000, payable to Vern Markee and Rand Truck Line, dated November 2, 1945, and ask you whether that is what you received for that mortgage?

A. Yes, that is the check we received.

Mr. Dougherty: Your Honor, I fail to see any relevancy here at all.

The Referee: What is the date of those instruments?

Mr. Dougherty: This is November 2, 1945.

Mr. Bollenback: The note is in October and the check is in November.

Mr. Dougherty: Yes. I thought they were talking about a transaction which occurred in August of '46.

The Referee: I think we had better clear up the original transactions by having the original mortgage of 1944. The original mortgage of 1946 is attached to Mr. Heider's claim.

Mr. Bollenback: Do you, your Honor, want an explanation of what I have in mind at this time?

The Referee: All right.

(Testimony of Vern Markee.)

Mr. Bollenback: And it is a matter which I think Mr. Heider is going to be bound to prove.

At the hearing that we had, Mr. Heider produced checks totaling \$36,500, which includes this \$5,000 check and it was his claim at that time that these checks represented the money [33] that he paid out on this first mortgage. At this stage of the proceeding we have Mr. Rand, who says he got \$3,000 which nobody knows where it came from, and we also have testimony by Mr. Markee that this \$5,000 check that is claimed to be part of the consideration for the first mortgage is, in fact, a consideration for one of these subordinate mortgages which were paid off by the second mortgage, so we find Mr. Heider here who has only produced \$31,500 worth of checks for a \$43,000 mortgage.

The Referee: Well, you have those marked.

Mr. Bollenback: Very well. The check itself——

The Referee: Has it been marked?

Mr. Bollenback: It hasn't been marked, your Honor.

Mr. Dougherty: If the Court please, of course by remaining silent we don't agree to counsel's misstatement of the record. The statement was that cash and checks were delivered.

The Referee: Do you mean formerly?

Mr. Dougherty: Yes, sir.

(Thereupon, a check dated November 2, 1945, drawn on The First National Bank of Sheridan, in favor of Vern Markee and Rand Truck Line,

(Testimony of Vern Markee.)

in the amount of \$5,000, signed by Otto W. Heider, was marked for identification Trustee's Exhibit No. 16.

A promissory note in the amount of \$5,400, dated at Sheridan, Oregon, October 31, 1945, in favor of Rand Truck Line, signed by Vern Markee, attached to [34] a chattel mortgage of even date and amount, in favor of Rand Truck Line, signed by Vern Markee, was marked for identification Trustee's Exhibit No. 17.)

Mr. Bollenback: At this time, your Honor, Trustee's Exhibit 16 is the \$5,000 check referred to; Trustee's Exhibit 17 is the note and mortgage which were just referred to.

The Referee: You are offering them now?

Mr. Bollenback: I am offering them in evidence.

Mr. Dougherty: We have no objection to the exhibits being received.

The Referee: They may be received.

(Thereupon, the check heretofore marked Trustee's Exhibit No. 16, and the note and mortgage heretofore marked Trustee's Exhibit No. 17 were marked as received in evidence.)

Mr. Bollenback: Now, if the Court please, may we offer in evidence at this time not only the Heider testimony at the previous hearing, but also the testimony of Vern Markee, which was given July 6, 1949? It is all bound in the same transcript and we

(Testimony of Vern Markee.)

feel that that should be part of the evidence in this case too.

Mr. Dougherty: I am sorry, your Honor. We will have to object. It relates to matters not germane to this controversy, in a large part. Mr. Markee is in court. [35]

Mr. Bollenback: We will accept the modification that it will be considered as evidence only insofar as it would be relevant.

Mr. Dougherty: I haven't examined it, your Honor, and I am not prepared blindly to stipulate that it may be received, and I do believe that it is subject to an objection for relevancy.

Mr. Bollenback: I have no further questions, Mr. Markee.

Cross-Examination

By Mr. Dougherty:

Q. Mr. Markee, when you went into Rand Truck Line, was it a solvent company, operating on a cash basis? A. At the time I went in?

Q. Yes. A. Yes, I am sure it was.

Q. And at the time of these various transactions with Mr. Heider was it a good, going business, operating on a cash basis?

A. Which transactions are you referring to now?

Q. Well, for example, when this money was borrowed and there was a Rand Truck Line mortgage assigned to Mr. Heider.

A. The first mortgage or second mortgage?

Q. First mortgage. A. Yes, it was.

(Testimony of Vern Markee.)

Q. Did you ever discuss the internal affairs of the corporation with Mr. Heider?

A. No, sir, I didn't believe I did.

Q. Do you think that any of the other stockholders or officers, [36] or do you know whether or not any of the stockholders or officers discussed the internal affairs of the corporation with Mr. Heider?

A. I can't speak for the other stockholders.

Q. To your knowledge did any of the others ever discuss the internal affairs with him?

A. I can't say; I am sorry. They might have.

Q. They might have, but do you know of any occasion when they did? Do you know of any time when they did?

A. I wouldn't know of any particular time but they probably did discuss it with Mr. Heider.

Q. You did not do so? A. No.

Q. It is a fact that there were various financial transactions through Mr. Heider's office?

A. Yes.

Mr. Dougherty: I have no further questions.

Mr. Bollenback: Will the reporter read the last question, please?

(The last question was read.)

The Referee: Did the corporation have any difficulty in meeting these payments of a thousand dollars every month throughout that whole time?

A. Yes, sir.

The Referee: Did you have to refinance in '46?

A. Yes, sir. I am not sure of the date, sir, but we did. [37]

(Testimony of Vern Markee.)

The Referee: That is what you call the second mortgage?

A. I think so.

The Referee: Why did you have to refinance at that time? Were you having difficulties?

A. Yes. I would have to look over the details at the time to remember exactly what happened, but we were having troubles at that time.

The Referee: Didn't you buy some additional equipment at that time, or did you, at the time of the second mortgage?

A. I can't say for sure.

Redirect Examination

By Mr. Bollenback:

Q. Well, Mr. Markee, actually you had to borrow money from Mr. Heider practically immediately, didn't you? Not only did you have that mortgage that we were talking about awhile ago, but I will hand you Trustee's Exhibit 4, which was a mortgage that was signed in 1946. That was another occasion where you got some money from Mr. Heider, wasn't it?

Mr. Dougherty: May the record show that the note that has been handed the witness is signed by Rand Truck Line and that Mr. Markee's name nor signature appears on it.

Do I understand counsel that when you say "you" you meant Rand Truck Line?

(Testimony of Vern Markee.)

Mr. Bollenback: I meant Rand Truck Line. They were in financial difficulties. [38]

A. This note and mortgage was signed by H. H. Macy, at that time general manager, and I did know of it but I didn't participate in this particular note myself.

Q. Now I am going to hand you——

The Referee: Just a minute. You will have to dispose of these matters. You referred to an exhibit. Is it understood that all of the exhibits under the former record are to be introduced in evidence?

Mr. Bollenback: It is my understanding that that was what the stipulation was.

Mr. Dougherty: I understood we had a stipulation concerning Mr. Heider's prior testimony. We have no objection to any exhibits being received which were previously received and which relate to Mr. Heider in any way. In view of the fact that this particular instrument is payable to the order of Earl Walden and relates to the purchase of a Ford van, and is not negotiated to Mr. Heider, and was not assigned to him, at the moment I don't see any connection with Mr. Heider. There may be.

Mr. Bollenback: Mr. Dougherty, if you will refer to the mortgage you will find that Mr. Heider was made an alternate payee.

Mr. Dougherty: It says, “* * * whereas Rand Truck Line, by H. H. Macy, Gen. Mgr. * * * has purchased from Earl Walden or Otto W. Heider * * *” a certain Ford van for a price of \$1,080.00. Well,

(Testimony of Vern Markee.)

there is that connection, for whatever it may be worth.

The Referee: It may be received. [39]

(Thereupon, the note and mortgage hereinbefore described, previously marked Trustee's Exhibit 4 in the former hearing, was marked as received in evidence.)

Mr. Bollenback: Will you mark this?

(Thereupon, a document entitled "Conditional Sales Contract," executed by Rand Truck Line, Vern Markee, dated April 9, 1946, and covering one 1945 Fruehauf van semi-trailer, with a promissory note in the amount of \$2,700.00, of even date and like signature, in favor of Otto W. Heider attached as a part thereof, was marked for identification Trustee's Exhibit No. 18.)

Q. (By Mr. Bollenback): Now, Mr. Markee, I hand you Trustee's Exhibit 18 for identification, which purports to be a conditional sales contract, with a note attached, signed by Rand Truck Line, payable to Otto W. Heider, dated April 9, 1946, and ask you whether or not that isn't also a part of the financing that the Rand Truck Line was forced to do?

A. Yes, this was purchase of additional equipment to be used in the operation.

Mr. Dougherty: No objection.

(Testimony of Vern Markee.)

The Referee. Was that purchased from Mr. Heider?

A. No, sir, I think it was from Fruehauf Trailers, in Portland.

The Referee: It may be received.

(Thereupon, the document hereinbefore marked Trustee's [40] Exhibit 18 was marked as received in evidence.)

Mr. Bollenback: I have nothing further at this time.

Recross-Examination

By Mr. Dougherty:

Q. Mr. Markee, when did you suffer your large fire loss?

A. Either '46 or '48; I am not sure as to the date.

Q. Was it that unexpected fire loss which was the immediate cause of the financial difficulties of the corporation?

Mr. Bollenback: Object to that as calling for a conclusion.

The Referee: Overruled.

A. Well, I can't say as to how much damage it did but it was quite a drain on the operation of the truck line, yes.

Q. Some of these other financing arrangements where Rand Truck Line bought equipment and borrowed money from Mr. Heider to buy the equipment and gave him a chattel mortgage, or possibly even

(Testimony of Vern Markee.)

bought equipment from him on a conditional sales contract, were there several of those transactions?

A. Yes, during the number of years there was.

Q. And were some of those prior conditional sales contracts or chattel mortgages and the obligations evidenced by them included in what we refer to as the second mortgage?

A. I can't answer to that; I don't know. If I did answer I would be just guessing.

Mr. Dougherty: No further inquiries. [41]

Further Redirect Examination

By Mr. Bollenback:

Q. Mr. Markee, were those fire loss claims ever paid?

A. I can't answer that either, because I didn't have anything to do with it.

Q. Well, I think your fire occurred in 1946, didn't it? A. Somewheres around there, yes.

Mr. Bollenback: I wonder if I might have Claim No. 2, your Honor?

Mark this, please.

(Thereupon, a document headed "Proof of Claim in Bankruptcy," signed by Gladys Aljovin on behalf of Better Products Co., together with supporting documents attached, was marked for identification Trustee's Exhibit No. 19.)

Mr. Bollenback: At this time I would like to offer in evidence Trustee's Exhibit No. 19, which

purports to be a claim filed herein by Better Products Co., resulting from a loss from fire in the terminal in McMinnville, supported by a bill of lading dated July 15, 1946, and also supported by a letter signed by Beryl B. Taylor, President of the Rand Truck Line, Inc., dated April 1, 1948, in which they acknowledge the indebtedness of \$53.00 growing out of the fire in McMinnville on July 18, 1946.

The Referee: The purpose of the offer?

Mr. Bollenback: The purpose of the offer is not only to establish a creditor that has existed up to the present time, [42] from that date, but also to fix the date of the fire.

Mr. Dougherty: If the Court please, the offered exhibit is in this connection purely hearsay. Now if the witness can refresh his recollection from this, or something, we have no objection to that.

The Referee: I think it may be received. When those proofs of claim import validity on their face they are admissible in evidence as prima facie evidence of the claim itself, and it has just been put in for two purposes, so I will overrule the objection. It may be received.

(Thereupon, the document heretofore marked Trustee's Exhibit No. 19 was marked as received in evidence.)

Mr. Bollenback: We have nothing further of Mr. Markee.

Mr. Dougherty: No further inquiries.

(Witness excused.)

Mr. Bollenback: Your Honor, we have Mrs. Rand coming in this afternoon, and also one other witness who will be very short, and we have nothing further to occupy the morning with. We think we have made a prima facie case but we do want to reserve the right to call the witnesses.

The Referee: What is your pleasure, Mr. Dougherty? Would you like to adjourn now until two and consider this matter, or would you like to proceed with any evidence you want to introduce?

Mr. Dougherty: If the Court please, we do not wish to proceed at this time, primarily because we feel that nothing approaching [43] a prima facie case has been made.

We would like at this time to be sure, in line with the Court's prior comments, that the proper documents are in evidence with respect to the Proof of Claim.

I have here what purports to be a recorded mortgage from Rand Truck Line to H. H. Macy, bearing the County Clerk's stamp.

The Referee: What is the date of that?

Mr. Dougherty: It is dated August 7, 1946.

Mr. Miller: Is there a file number on that, Mr. Dougherty?

Mr. Dougherty: It is Volume 107, page 676 of the Mortgage Records of Yamhill County.

The Referee: I would like to have that added as an exhibit in support of your claim, because the claim has been questioned and I would like to have you support it by the documents. He did attach to

his Proof of Secured Claim what seems to be a duplicate original, but not the recorded one.

Mr. Dougherty: May we so offer it now?

The Referee: Yes.

Will you mark that exhibit?

(Thereupon, the mortgage hereinabove described was marked for identification as Claimant's Exhibit No. 20.)

Mr. Dougherty: Has this been received, your Honor?

The Referee: It may be received, yes. [44]

(Thereupon, the document heretofore marked Claimant's Exhibit No. 20 was marked as received in evidence.)

Mr. Dougherty: May I inquire whether or not the assignment appears with the Proof of Claim?

The Referee: Suppose you look at it.

Mr. Dougherty: If the Court please, the assignment does not seem to be attached to the claim. May I inquire of counsel whether or not any objection is made? Well, as a matter of fact we know it isn't because it isn't in the objections to the Proof of Claim. No objection is taken on that ground. I would like to have an opportunity to attach it to the original.

The Referee: Could we have the original mortgage in 1944, because I think this is a renewal of at least part of the mortgage of '44.

Mr. Heider: I didn't know the old mortgage was involved and I kind of doubt if I brought it along.

The Referee: You did introduce at the former hearing a copy of it.

Mr. Heider: You say a copy was introduced?

The Referee: A copy was introduced.

Mr. Heider: Then I think the original mortgage of 1944 has been returned to Rand Truck Line and would not be in our possession.

The Referee: Do you have the original mortgage?

Mr. Bollenback: The only one I have, your Honor, is the one put in evidence here, which apparently was a signed copy, all [45] right. There is no filing on it.

Mr. Heider: If it was recorded I could get a certified copy of it and have it sent down.

The Referee: That would suffice. Do they photostat now?

Mr. Heider: Oh, yes, they photostat. I would be very glad to.

Mr. Miller: Mr. Dougherty, I have examined Claimant's Exhibit No. 20 and I wonder if you could answer some questions. It contains both real and personal property and it states on its back that it is recorded in Book 107, page 676, Record of Mortgages of said county. I would like to ask if you know, was that recorded in the real property mortgages or in the personal property mortgages?

Mr. Dougherty: It is cross-indexed as the statute provides.

Mr. Miller: They usually say so on the mortgage. I find no such statement here is why I am asking.

Mr. Dougherty: I don't believe they do so in Yamhill County, however.

Mr. Miller: Then I would like to ask Mr. Heider unofficially if he knows, was this particular mortgage the mortgage of August 7, 1946, recorded in Multnomah or any other county except Yamhill?

Mr. Heider: No, except the Register of Migratory Chattels in the Secretary of State's office.

Mr. Miller: Was that a filing of the entire mortgage in the Migratory Chattels records, or just the vehicles?

Mr. Heider: No, just the vehicles record was made in Salem. [46]

Mr. Miller: Can you answer me about the first mortgage now? There seemed to be some doubt at the first meeting about this.

Mr. Heider: I think the same filing on that was made as on this in Yamhill County, and I can get a certified copy of it.

The Referee: He has agreed to get us a certified photostatic copy of that mortgage.

Mr. Heider: It will have the filings on it.

The Referee: Well, it is nearly ten minutes till twelve. We will adjourn this hearing, to reconvene at two o'clock. The witnesses under subpoena will please return at two o'clock.

(Noon recess.) [47]

Afternoon Session, 2:00 P.M.

The Referee: You may proceed.

Mr. Bollenback: I will call Mr. Ellis, please.

DEAN ELLIS

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. What is your occupation, Mr. Ellis?

A. I am a lawyer.

Q. And how do you practice law? Are you in a partnership?

A. I am in a partnership with my father, William P. Ellis.

Q. Now did the partnership represent, at any time, Rand Truck Line? A. Yes, it did.

Q. Is Rand Truck Line indebted to the partnership? A. Yes, it is.

Q. Have you a statement of the indebtedness of Rand Truck Line to the partnership of Ellis & Ellis? A. Yes, I have.

Q. May we have it, please?

We will ask that this document be marked for identification as Trustee's Exhibit 21.

(Thereupon, a statement of Ellis & Ellis to Rand Truck [48] Lines, Inc., dated July 8, 1949, was marked for identification Trustee's Exhibit No. 21.)

Q. Now is the sum shown here——

Mr. Dougherty: We object to it, your Honor, because no relevancy with respect to the instant proceeding has been shown.

(Testimony of Dean Ellis.)

Mr. Miller: I haven't offered it yet.

Mr. Dougherty: Well, don't ask him any questions about it until you do, please.

Mr. Miller: That is my privilege.

Q. This sum shown on it, \$1,099.67, is still unpaid, is it?

Mr. Dougherty: Objected to.

The Referee: He may answer.

A. It hasn't been paid.

Q. (By Mr. Miller): And did Ellis & Ellis file a claim in this proceeding?

A. Yes, they did.

Mr. Miller: I will offer it.

Mr. Dougherty: Objected to on the ground that it is irrelevant with respect to the claim of Otto W. Heider, which we understood was the matter being considered today.

Mr. Miller: Well, the matter is to show, your Honor, that there was a creditor who had rights under the Oregon law against this mortgage.

The Referee: When did you say it was performed?

Mr. Miller: That is stated on the face of it. I haven't [49] finished with the witness yet.

The Referee: All right.

Q. William P. Ellis was engaged in the practice of law as an individual prior to the formation of this partnership? A. That is correct.

Q. And are the books and records of William P. Ellis in the office which you now occupy?

A. Yes.

(Testimony of Dean Ellis.)

Q. Are you familiar with the books and records of William P. Ellis? A. I am.

Q. Do they show an indebtedness from Rand Truck Line to William P. Ellis? A. Yes.

Q. And is that a copy of the indebtedness there?

A. That is a copy of the indebtedness.

Mr. Miller: We will ask that this be marked Trustee's next exhibit.

(Thereupon, a statement of Wm. P. Ellis, Individual, to Rand Truck Lines, Inc., dated July 8, 1949, was marked for identification Trustee's Exhibit No. 22.)

Q. And to your knowledge is this indebtedness on Trustee's Exhibit 22, \$1,686.00, still unpaid?

A. It has not been paid.

Mr. Miller: We will offer Trustee's Exhibits Nos. 21 and 22, [50] your Honor, two pages, to show the existence of a creditor from '46 prior to the existence of the mortgage, right on through.

Mr. Dougherty: Objected to on the ground of relevancy and because the documents do not show or purport to show what counsel has stated for them. They show accounts and indebtedness as of July 8, 1949, subsequent to the mortgages.

Mr. Miller: If the Court please, counsel is not reading from the documents. He is summarizing. May I see the document, please? Part of the services were rendered August 1, 1946, according to the document.

Mr. Dougherty. There is an item for services

(Testimony of Dean Ellis.)

rendered between August 1, 1946, and August 1, 1948, which is some time subsequent to the priority claim here.

Mr. Miller: If the Court please, the interpretation of the document is for the Court. We are offering the documents into evidence with the Court's right, of course, to interpret them as the Court sees fit.

The Referee: You had this witness testify what services were performed?

Mr. Miller: Not that early, your Honor. His father, Mr. Ellis Sr., is out of town.

The Referee: I am going to overrule the objection at this time. They will be received subject to the objection of counsel.

(Thereupon, the documents heretofore marked Trustee's Exhibit No. 21 and Trustee's Exhibit No. 22, respectively, [51] were marked as received in evidence.)

Mr. Miller: No further questions.

Cross-Examination

By Mr. Dougherty:

Q. Was any security received, Mr. Ellis?

A. There was no security for any of the obligation.

Mr. Dougherty: No further inquiries.

Mr. Miller: Thank you very much.

(Witness excused.)

Mr. Bollenback: Call Mrs. Rand, please.

GOLDA I. RAND

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bollenback:

Q. Now, Mrs. Rand, prior to September 28, 1944, were you a stockholder in the Rand Truck Line?

A. Forty-what?

Q. Forty-four. A. I presume so.

Q. Well, just so it won't confuse you, that was the date, I think, of the transaction in which Vern Markee and his wife and Loren Markee acquired your stock in the Rand Truck Line. Did you have any part in the negotiations going on for the sale of your [52] stock? A. No.

Q. Mr. Rand handled it, is that right?

A. That's right.

Q. The note and mortgage which were given at that time, Mrs. Rand, Trustee's Exhibits 3 and 6, show that that note and mortgage were payable to you. Now was there any discussion with you before that note and mortgage were executed as to your being made payee of that mortgage?

A. No, sir.

Q. You didn't know anything about the transaction?

A. Well, I knew that we were selling out but I didn't have any part in it that I remember of.

(Testimony of Golda I. Rand.)

Q. Your husband said this morning that he thought he was hunting at the time the transaction was closed. A. That's right.

Q. Now is that your signature on the back of that note? A. Yes, it is.

Q. Do you remember where you were when you signed that endorsement?

A. In Mr. Heider's office.

Q. Was there any discussion at that time as to why those typewritten words were above your signature?

A. So far as I am concerned I was asked to go up there and sign whatever papers were necessary to close the deal and I went up and signed them and I never read the note and I don't know anything [53] about it.

Q. The papers were there before you went there, is that right? A. Yes.

Q. You didn't take them with you? A. No.

Q. They were in his office when you got there?

A. I am sure they were.

Q. Leastwise you didn't take them there?

A. No.

Q. And Mr. Heider just put some papers in front of you and asked you to sign them, is that what happened?

A. That must have been what it was, and I trusted him.

Q. Now, Mrs. Rand, did the corporation receive anything for that note and mortgage that it gave you? A. Do you mean before this was signed?

(Testimony of Golda I. Rand.)

Q. No, those papers in front of you, that note and mortgage, are an agreement on the part of the Rand Truck Line to pay you \$43,560, if I have the figures correct. Now, that is what those documents represent. Did you give the Rand Truck Line anything for that note and mortgage? A. Did I?

Q. Yes. A. No, sir.

Q. Do you know if anyone else gave the Rand Truck Line anything for that note and [54] mortgage?

A. Well, who do you mean, anybody else?

Q. Well, you were, up to that time, a stockholder of the corporation, and the corporation executed a note and mortgage for forty-three thousand, five hundred and some odd dollars. Now what did the corporation get in return for that note and mortgage?

A. Well, they got the full payment, as far as I know.

Q. You mean that the money was paid to the corporation? A. Well, it must have been.

Q. Wasn't the money paid to you and Mr. Rand?

A. Well, there was just three in the corporation, my sister-in-law, and Mr. Rand, and myself.

Q. And you three are the ones that got the money, isn't that right?

A. That's right.

Q. And that mortgage was drawn so that Mr. Heider or the Markees would pay you some money in payment of your stock in the corporation; that

(Testimony of Golda I. Rand.)

is what it was, wasn't it? A. That's true.

Q. And the corporation itself, as distinguished from the stockholders, didn't get anything, did it?

A. That I don't know.

Q. Now who asked you to go to Mr. Heider's office? A. Mr. Rand.

Q. Mr. Rand. Was the time set for the appointment for you to go or were you supposed to wait until Mr. Heider notified you, or what? [55]

A. That I don't remember. It is a long time ago.

Q. Did you get some money at the time you signed these papers? A. No, sir.

Q. You just went in and signed them and turned around and walked out? A. That's right.

Mr. Bollenback: You may inquire.

Cross-Examination

By Mr. Dougherty:

Q. When you sold out the business and signed these papers, Mrs. Rand, it was a good, going business, wasn't it? A. Well, yes.

Q. And when you sold it you sold it clean? I mean any bills had been paid except whatever might be quite current, is that right?

A. I don't remember that.

Q. So far as you recall, the company, when you sold it, wasn't indebted at all?

A. I don't think so.

Q. And was it your understanding that you were selling the company and all of its assets?

(Testimony of Golda I. Rand.)

A. I can't answer you that.

Q. This has been how many years ago?

A. Twelve years.

Mr. Dougherty: No further inquiries. [56]

Redirect Examination

By Mr. Bollenback:

Q. You did know, didn't you, Mrs. Rand, that what you were selling was the capital stock in the corporation?

A. I wasn't too familiar with it.

Q. You let your husband take care of that?

A. That's right.

Q. I may be repeating myself, but just to be sure, you didn't yourself personally, pay anything to this corporation when it executed this mortgage in your favor, did you? A. No.

Mr. Bollenback: I think that is all.

The Referee: Thank you. May Mrs. Rand be excused now?

Mr. Bollenback: I think so, your Honor, and thank you for coming down, Mrs. Rand.

The Referee: And how about Mr. Rand?

Mr. Bollenback: So far as we are concerned you may go, Mr. Rand. Thank you.

The Referee: You are welcome to stay, though.

(Witness excused.)

Mr. Miller: If the Court please, the Trustee offers into evidence the schedules of Rand Truck

(Testimony of Golda I. Rand.)

Line, an Oregon corporation. If necessary we can get Mr. Taylor to identify the signatures.

(Thereupon, a document entitled "Statement of Affairs" [57] and pertaining to Rand Truck Line, Inc., was marked for identification as Trustee's Exhibit No. 23.)

Mr. Dougherty: May I inquire, are the schedules being offered as evidence of the truth of any matters stated in the schedules?

Mr. Miller: The statement of assets and liabilities of the corporation as of the date of bankruptcy—that is, the corporation's statement of it. It is rebuttable, of course.

Mr. Dougherty: We have no objection to the schedules being considered as the statement of the person who prepared them, no.

The Referee: They may be received.

(Thereupon, the document heretofore marked Trustee's Exhibit No. 23 was marked as received in evidence.)

Mr. Miller: If the Court please, the Trustee offers into evidence the claims filed here by creditors, numbers 1 to 114, inclusive.

The Referee: As one exhibit?

Mr. Miller: As one exhibit. I might state, your Honor, that I believe Claim 2 is already in evidence, but we will just offer the entire group as one exhibit.

The Referee: Any objection?

Mr. Dougherty: Your Honor, we cannot admit the truth of any matters stated in the claims. We can admit claims have been made under these circumstances and in certain amounts.

The Referee: They are all made under oath of the claimants. They may be received. I am not sure in my mind what relevancy [58] they may have, but I think I should have them in evidence if the briefs of the law indicate that they are matters that should be considered.

Mr. Bollenback: That will be Trustee's Exhibit 24, the claims.

The Referee: Well, you just mark the outside of the file.

(Thereupon, the file containing the above-described claims was marked as received in evidence as Trustee's Exhibit No. 24.)

Mr. Bollenback: Will you mark these?

(Thereupon, a packet of checks drawn by Otto W. Heider on The First National Bank of Sheridan, Nos. 1 to 63 inclusive being in the amount of \$500.00 each, drawn in favor of R. R. Rand and/or Goldie I. Rand, and unnumbered checks to the same payees in the respective sums of \$359.06, \$787.88 and \$33.70, and one check drawn to Rand Truck Line in the sum of \$148.59, by the same payor on the same bank, with adding machine tape attached, was marked for identification as Trustee's Exhibit No. 25.

A packet of 11 receipts signed by Otto W.

Heider and made in favor of Rand Truck Line and in favor of Vern Markee, together with 2 checks drawn on The First National Bank of McMinnville by H. H. Macy in the sum of \$2,500.00 each, one payable to Vern Markee and the other payable to Loren Markee, were [59] marked for identification as Trustee's Exhibit No. 26.

A check drawn on the Douglas County State Bank, Roseburg, Oregon, by Otto W. Heider to Rand Truck Line, in the sum of \$5,000, 2 checks drawn on The First National Bank of Sheridan by Otto W. Heider, one in favor of Rand Truck Line in the sum of \$4,508.00 and the other in favor of Rand Truck Line, Inc., and Transport Bodies & Equipment Co., in the sum of \$3,000, and a charge-your-account slip from the First National Bank, Sheridan, Oregon, to Otto W. Heider, covering a certified check dated August 6, 1946, to Rand Truck Line in the sum of \$5,000.00 were marked for identification as Trustee's Exhibit No. 27. (Adding machine tape attached.)

Mr. Bollenback: At this time I would like to offer into evidence Trustee's Exhibit No. 25 for identification, which is the group of 63 checks of \$500, drawn by Otto Heider, payable to R. R. Rand and/or Golda Rand, together with some other checks by the same drawor and the same payees, bearing notations of interest. There is also one check in here which probably might be irrelevant but I felt it should go in, and that is the check to

Rand Truck Line in the amount of \$148.59. As far as I know, it is for some other transaction, not involved here, but as long as it is Mr. Heider's check and produced here I thought it should go into [60] evidence; either that or be returned to him.

Mr. Dougherty: No objection.

The Referee: It may be received.

(Thereupon, the packet of checks heretofore marked Trustee's Exhibit No. 25 was marked as received in evidence.)

Mr. Bollenback: I shall offer Trustee's Exhibit 26 into evidence, which in fact consists of 11 receipts for various amounts and various dates, signed by Otto Heider. Some of them are made in favor of the Rand Truck Line, some in favor of Vern Markee, and the two checks for \$2500.00 each dated January 12, 1946, signed by H. H. Macy, payable to Vern Markee—one to Vern Markee and one to Loren Markee, both of which checks were endorsed by the payee and bear the subsequent endorsement of Otto Heider.

Mr. Dougherty: No objection.

The Referee: They may be received.

(Thereupon, the packet of receipts and checks heretofore marked Trustee's Exhibit No. 26 was marked as received in evidence.)

Mr. Bollenback: At this time I wish to offer into evidence Trustee's Exhibit 27. The exhibit consists of adding machine tape with items totaling \$36,-027.00, with the pen and ink notation immediately

below it, "Plus services," together with a check drawn by Otto Heider on The First National Bank of Sheridan, dated August 14, 1946, payable to the Rand Truck Line for [61] \$4,508.00, together with the check drawn on the Douglas County State Bank of Roseburg, Oregon, by Otto Heider, dated August 7, 1946, payable to Rand Truck Line, in the amount of \$5,000.00; the check on The First National Bank of Sheridan drawn by Otto Heider, payable to the order of Rand Truck Line, Inc., and Transport Bodies & Equipment Co. for \$3,000.00, dated August 7, 1946, bearing on the top of the check a notation, "for title for 1946 Transport Van Trailer," together with a statement of a certified check issued by The First National Bank of Sheridan showing that a certified check dated August 6, 1946, of Otto Heider, payable to Rand Truck Line, in the amount of \$5,000.00 was certified, signed by Frances Papstein, cashier.

It is my understanding that this exhibit shows the claim make-up of the second mortgage.

The Referee: What exhibit is that?

Mr. Bollenback: It is 27, I think, your Honor.

Mr. Dougherty: No objection.

The Referee: It may be received.

(Thereupon, the sheaf of checks and documents heretofore marked Trustee's Exhibit No. 27 was marked as received in evidence.)

The Referee: Any further testimony?

Mr. Miller: We will call the Trustee, Mr. McAllister, please. [62]

S. A. McALLISTER

the Trustee, was thereupon produced as a witness, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. I hand you a document headed "Discount on Capital Stock, Account No. 1900." Do you recognize that? A. Yes, sir.

Q. Did it come from the books and records of the bankrupt? A. It did.

Q. It came from the ledger, did it?

A. General ledger, yes.

Mr. Miller: I will ask that this be marked.

(Thereupon, the ledger sheet above described was marked for identification as Trustee's Exhibit No. 28.)

Q. I am handing you Trustee's Exhibit 28 for identification. Just what is that document?

A. It is a journal entry made on July 31, 1944, setting up a total asset of \$20,732.66, of which amount \$12,500.00 is set up as franchise and permits. The balance, \$8,232.66, is set up as good will.

Q. Well, then those two items together make up the item of Discount on Capital Stock?

A. That's right.

Mr. Miller: That is all. [63]

Mr. Miller: We will offer in evidence Trustee's Exhibit 28 for identification, your Honor.

Mr. Dougherty: We object to it on several

(Testimony of S. A. McAllister.)

grounds. First, the Trustee has indicated no personal knowledge of it; secondly, we very strenuously object to morsels and items being torn out of the books of account and offered piecemeal. Thirdly, we object because there is no connection shown and none in evidence concerning any knowledge which this claimant might have had of any such transaction, and in fact, the three dates, any of the transactions between Mr. Heider and the Rand Truck Line, which are involved here. Fourth, that no relevancy has been shown.

Mr. Miller: If the Court please, at the time that the Trustee offered into evidence Trustee's Exhibit No. 14, being the balance sheets of the bankrupt, counsel for the claimant remarked that there were certain things in there that needed explaining. The offered document, Trustee's Exhibit No. 28 for identification, is a ledger sheet which tends to explain one unexplainable item on Trustee's Exhibit No. 14, the item of Discount on Capital Stock. In other words, it is a direct reference from the balance sheet as shown on Trustee's Exhibit 27 to the ledger of the bankrupt.

Of course, the Trustee has no personal knowledge of the books, except he knows what books were turned over to him by the bankrupt, and he has said these were the books and records of the bankrupt, turned over to him. [64]

As far as taking out part, I will be glad to offer the ledger in toto as a part of the same exhibit. I merely didn't want to incumber the exhibits.

(Testimony of S. A. McAllister.)

As far as the witness' knowledge, when you are proving insolvency that is not improper. We have alleged insolvency and this goes to show insolvency.

We will offer the entire ledger, your Honor, and ask that the entire ledger be marked Trustee's Exhibit 28 and offer it into evidence.

I would like to say one more thing your Honor, as far as these books or any others are concerned, anybody's testimony as to what is in these books would be hearsay. These are the books of original entry and they are the best evidence of the state of the business affairs of the company.

Mr. Dougherty: If the Court please, if counsel is going to make statements of fact of that sort I believe he should be sworn, if he is stating of his own knowledge that this is the book of original entry.

The Referee: I think there are persons in the room that could prove that if he would like to have it.

Mr. Dougherty: May I inquire preliminarily?

The Referee: Yes.

Mr. Dougherty: Mr. McAllister, you have long experience as an accountant, do you not?

A. That is right. [65]

Mr. Dougherty: Mr. McAllister, I hand you Trustee's proffered exhibit for identification No. 28, being not only the one sheet but the entire book, and ask you if it is not the fact that that isn't a book of original entry but simply is a ledger containing part of the balances from other accounts?

(Testimony of S. A. McAllister.)

A. It is a general ledger, is what it is termed. It shows all the expense items, and asset items, and liability and so forth.

Mr. Dougherty: Yes, but it isn't a volume of original entry, is it?

A. There could be some other entries, yes; there would have to be.

Mr. Dougherty: The entry would be on the journal and on the various accounts that this book merely summarizes? A. That's right.

Mr. Dougherty: Do you know why, Mr. McAllister, part of the 1944 sheets are missing from this volume?

A. I think I can explain that. I think possibly Mr. Taylor could explain it better, but it seemed they had a habit every few years of transferring the sheets, and that is what they did.

Mr. Dougherty: So this isn't a complete volume in that respect?

A. It is complete from 1944 through '46.

Mr. Dougherty: Well, aren't some of the '44 sheets missing from there, Mr. McAllister?

A. Well, except this one that is missing, Exhibit No. 28.

Mr. Dougherty: And aren't there 1946 transactions which [66] aren't recorded there?

A. Not to my knowledge. It looks as though some of these accounts have balances as of January 1, 1946. They aren't itemized and I think you are correct in that part, but for the most part they are all itemized.

(Testimony of S. A. McAllister.)

Mr. Dougherty: They do not have January 1, 1947, balances there? A. No.

Mr. Dougherty: Or 1948?

A. I think not. I just got ahold of this book yesterday. I haven't had a chance to look at it. I would say it just goes up to 1946, the end of December, 1946. I haven't seen any '47 or '48 entries here (looking through ledger).

Mr. Dougherty: So, as I understand it, you haven't made an examination of this?

A. Well, my experience as an accountant teaches me that apparently it is in balance. I could strike off a balance sheet, if that is what you want.

Mr. Dougherty: Could you, as of the end of '44?

A. I think so.

Mr. Dougherty: I thought your testimony was that some of the '44 sheets were gone?

A. Some of these items do show balances as of January, '46, but it wouldn't have any relation to '44.

Mr. Dougherty: But are all of the '44 sheets there? [67] A. I think they are, yes.

Mr. Dougherty: What balance does it show for the asset balance for trucks and trailers?

A. Account No. 1222 shows a total asset value of \$63,949.49, and on Account No. 2521, termed as "Reserve for Depreciation — Trucks" it shows a credit indicating a reserve set up of \$47,432.59.

Mr. Dougherty: As of what date is this, Mr. McAllister?

(Testimony of S. A. McAllister.)

A. Well, this is as of December 31, 1946.

Mr. Dougherty: What is the figure as of December 31, 1944?

A. Well, it shows an asset value of \$68,238.96 but that part of the "Reserved for Depreciation" sheet is not complete. It has a balance as of January 1, 1946, hence I would have to take the trial balances for '44 and '45 to figure out the depreciation to get the reserve set up.

Mr. Dougherty: So, then, some of the '44 sheets, or at least one of them, seems to be missing?

A. Yes, but the balance sheet is there. It can be worked out. If you want a trial balance as of December 31, 1944, I am sure it can be worked out with the books we have.

Mr. Dougherty: How long have you had possession of this volume?

A. I just got it yesterday.

The Referee: Where has it been?

A. Over at the Rand Truck warehouse.

The Referee: Well, had you had it before? [68]

A. I had some of the books, your Honor, but these old books I didn't take. I took the current books; that is, for about a year back.

Mr. Dougherty: Your Honor, I don't want to impede the progress of this. If someone who has knowledge can assure me that this is the volume I have no particular objection to its being received.

The Referee: Mr. McAllister, did you remove that sheet from this volume, this Exhibit 28?

(Testimony of S. A. McAllister.)

A. Yes, sir, I did.

The Referee: Could you reinsert it, please?

A. Yes (reinserting sheet previously marked Trustee's Exhibit 28 for identification).

Mr. Miller: Mark the ledger on the outside cover.

(Thereupon a green-backed ledger was marked for identification as Trustee's Exhibit No. 28.)

The Referee: Do you want Mr. Taylor to identify this book?

Mr. Miller: Maybe he could identify it but he didn't make the entries.

The Referee: I am aware of that, but I wanted to know if he was in charge of this. If you are going to put him on I will reserve my ruling.

Mr. Miller: We have no further questions of Mr. McAllister. We have one other witness.

Mr. Dougherty: No inquiries. [69]

BERYL B. TAYLOR

was thereupon produced as a witness in behalf of the Trustee and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bollenback:

Q. Mr. Taylor, you were formerly connected with the Rand Truck Line?

A. I was, yes, sir.

(Testimony of Beryl B. Taylor.)

Q. In what capacity?

A. At the time of filing bankruptcy I was president.

Q. And how long had you been connected with the company prior to that time?

A. Since August 15, 1946.

Q. You have an exhibit in front of you, Trustee's Exhibit 28 for identification, which purports to be a ledger. Will you examine it and tell me whether you can identify that as a part of the books and records of the Rand Truck Line?

A. I am sure it is. I recognize all the handwriting. I had nothing to do with making the entries myself.

Q. Will you say it a little louder, Mr. Taylor, please?

A. I said I am sure it is because I recognize all the handwriting but I didn't prepare the book myself.

Q. You didn't prepare the book yourself. Was it made in the course of the ordinary business of the Rand Truck Line?

A. It was made by a party who was, prior to 1946, in the employ of [70] the Rand Truck Line for the purposes of preparing their financial statements and making their general ledger entries.

Mr. Bollenback: At this time we reoffer it.

Mr. Dougherty: No objection, your Honor.

The Referee: It may be received.

(Testimony of Beryl B. Taylor.)

(Thereupon, the ledger heretofore marked as Trustee's Exhibit No. 28 for identification was marked as received in evidence.)

Mr. Bollenback: Will you mark this?

(Thereupon a sheet headed "Analysis of Account No. 1650 'Other Investments—Officers'" was marked for identification as Trustee's Exhibit No. 29.)

Q. Mr. Taylor, I am going to hand you Trustee's Exhibit 29 for identification, which purports to be an Analysis of Account 1650, Other Investments—Officers, and ask you whether or not you took that information off of the books and records of the Rand Truck Line?

A. It was taken from the records, yes.

Q. By you or by someone under your direction?

A. Yes.

Mr. Bollenback: Now, your Honor, I don't know whether that is particularly relevant or not. It does show that some payments that were made to Otto Heider were charged to the account of the officers of the Rand Truck Line. It is offered in evidence in order that this Court might have all the evidence in front of it, [71] and if there is going to be any strenuous objection to it we will withdraw our offer.

Mr. Dougherty: No objection, your Honor.

The Referee: It may be received.

(Thereupon, the document heretofore marked for identification Trustee's Exhibit No. 29, was marked as received in evidence.)

(Testimony of Beryl B. Taylor.)

The Referee: From what source was that taken, may I ask?

A. Well, the 1659 account is a general ledger account and it could be traced back to the original book of entry to determine what they were and to whom they were paid.

Mr. Bollenback: At this time, your Honor, in order to avoid any oversight, the Trustee desires to reoffer in evidence Trustee's Exhibits 1 to 29, inclusive.

The Referee: Some of those were marked in the previous hearing, is that right?

Mr. Bollenback: They were, your Honor, and some of them have been marked twice, but the present set of numbers runs from 1 to 29. There are some duplications, but just in order that we don't overlook something, it is my desire to reoffer all of the exhibits that have been introduced.

The Referee: They will be received, subject to the objections which have been made in the record from time to time.

Mr. Bollenback: And now, your Honor, at this time the Trustee desires to amend his Third Objection to Proof of Claim, commencing [72] in the middle of page 4, and the reason for the amendment is that the evidence at this point does not disclose that any greater sum than \$31,500 was ever paid by Otto Heider to anybody on this mortgage, the first one, and in the first objections I did set out \$31,500 on line 2 of page 2, but in pleading the third defense the figure of \$36,500 was used be-

(Testimony of Beryl B. Taylor.)

cause that is the figure Mr. Heider stated on his deposition at the previous hearing.

The Trustee now desires to amend that to conform to the proof up to the present time of \$31,500, and that will necessarily change the other figures and the percentages in the objections to the claim. It will deduct \$5,000 from the principal and add \$5,000 to the interest, and then the claim balance of \$13,000 that was claimed to be due at the time it was refinanced would—a different proportion of it would be unpaid principal and unpaid interest, and it throws the computation completely off as to the second mortgage. However, the principle is there in essence, and that is that it was, in fact, an acrimonious transaction, and it is merely the details in how acrimonious it was for which this amendment is sought.

Mr. Dougherty: We object, your Honor. Of course, the amendment cannot be made as a matter of course. It can only be made by a legal court. Secondly, the objections as filed, are the sworn statement of the Trustee. I hesitate to be a party to any suggestion that the Trustee would care to deviate in any respect [73] from his sworn statements. Thirdly, we object again on the ground of laches. We have been unable to find any case where any court has allowed objections or amendments to objections to be filed at this late date. I am speaking of any reported case. Collier's Bankruptcy Manual indicates such tardy amendments cannot be

(Testimony of Beryl B. Taylor.)

filed either by the trustee or by anyone, and we would renew—we would object to the amendment on the same ground that we have objected to the objections being received.

The Referee: This amendment is in the nature of an amendment to the pleadings to conform to the testimony, is it not?

Mr. Bollenback: That is our position, your Honor, and further, Mr. McAllister is not in the position of the ordinary litigant who swears to a pleading. He has necessarily filed these pleadings as a result of hearsay. He didn't have any personal knowledge of the transaction so he should not be bound by any claimed admission.

Mr. Dougherty: If the Court please, I have always conceded the function of a trustee to make a preliminary examination. In this instance 7 years, approximately, have been allowed for that. While in minor matters we would have no objection to an amendment to conform with what counsel's idea of the proof is—in fact, however, the proof here has shown a far greater sum than alleged. However, as I understand this pleading, it was the informed judgment of the Trustee that that was the correct figure, and I have heard nothing which would in any way impair that judgment, [74] and it is a sworn statement.

The Referee: I am inclined to allow the amendment. It seems to me under the Rules of Civil Procedure they are very liberal in allowing amend-

(Testimony of Beryl B. Taylor.)

ments to pleadings, and this is in the nature of a pleading, being an objection to a claim.

Mr. Dougherty: Well, the Court has ruled. I was going to comment that I had never known of an amendment being allowed during trial in a Federal Court, but——

The Referee: I may say now that I didn't rule on the Supplemental Objections to the claim of Otto Heider. I don't see that they said anything, one way or the other. Therefore, I will sustain counsel's objection to this Supplemental Objection to Claim.

Mr. Bollenback: The Trustee has nothing further.

Mr. Dougherty: You may step down, Mr. Taylor.

(Witness excused.)

Mr. Dougherty: The Claimant will call Mr. Heider. [75]

OTTO W. HEIDER

was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dougherty:

Q. Now, Mr. Heider, was your claim in this matter filed on or about June 23 of 1949?

A. That's right.

The Referee: Just for the record, it was filed

(Testimony of Otto W. Heider.)

June 30th. If you would like you may refer to the original claim.

Mr. Dougherty: Thank you.

Q. Were the Trustee's objections to your claim served on you on or about January 26 of 1956?

A. Yes, a copy of it.

Q. Yes.

A. That was the first I had knowledge that there were any objections to the claim.

Q. Do you recall the prior hearing on this matter?

A. I do; about seven years ago.

Q. About July 6 of 1949?

A. That's right.

Q. Do you recall the statement of the Referee at that time that if the Trustee had any objections to the claim as filed, he would make those objections?

A. Yes, he did, and I took the matter up with Mr. Bollenback at [76] that time.

Q. And what occurred at that time?

A. Well, he asked me if I would give a discount if they paid it off immediately and I told him I would. That was before the hearing and after he had investigated the matter, and I told him I would give a discount of three or four per cent because they wanted to pay it off and get the equipment free, and I agreed to it.

Mr. Bollenback: Just a minute. I object to this statement that I made this offer after I had investigated it. He doesn't know whether I had investigated it. If he is going to testify to any conversa-

(Testimony of Otto W. Heider.)

tion with me let him say what I said and not his conclusions as to what I said. Further, it is not binding upon the Trustee.

The Referee: Well, you may continue to state what conversations you had with counsel for the Trustee. The objection as to what investigations he had made, I think, should be sustained.

A. (Continuing): Well, it was some time after the petition in bankruptcy had been filed that Mr. Bollenback contacted me.

Q. (By Mr. Dougherty): Mr. Heider, after 1949 and before 1946 have your office records been disrupted in any manner?

A. Yes, they have. The Bureau of Internal Revenue had them for two years and a half, all of them.

Mr. Bollenback: Just a minute here. I don't know just what the purpose of this thing is, for two reasons. There's been no [77] answer filed in this case. We don't know what he is trying to prove and what the disruption of his office records—Any disruption of his office records subsequent to the time of this original deposition is certainly immaterial because he produced his books and records at that time, and I would like to know the purpose. As I say, there is a complete absence of any answer, and actually it would probably be proper, technically, to move for a judgment on the ground that there hasn't been any answer, and he is attempting to plead laches, apparently. I am not sure, but if it is, it is an affirmative defense and we don't have any answer. I mean as far as the pleadings go, the

(Testimony of Otto W. Heider.)

objections are admitted because they aren't denied.

Mr. Dougherty: If the Court please, it is my understanding that it would be most improper for us to file any responsive pleading to the objections. First, it is my understanding that under the Federal Rules replies are not allowed unless a reply is directed by the Court. There has been no reply directed in this instance. It is my understanding that the claim is in the nature of a complaint and the objection is in the nature of an answer and this is the form for the court proceedings, and it is so stated in Collier.

With reference to what this line of testimony seeks to develop, counsel is quite correct. We are attempting to show laches.

The Referee: I think you made that objection previously. [78]

You may proceed with your testimony, and, of course, subject to cross-examination.

Q. (By Mr. Dougherty): Mr. Heider, did the Bureau of Internal Revenue return all of your records to you?

A. No; they didn't return all of them. They had all of them and they didn't return all of them and they still have some of them.

Q. Can you now present documentary and other proof which you could have presented—that is, to refute these objections, which you could have presented, say in 1949?

A. I think that I could have gotten some more books and records if they hadn't all been worked

(Testimony of Otto W. Heider.)

over for two and a half years by somebody other than myself.

Q. I believe, Mr. Heider, you stated that it was your understanding that objections would not be filed?

A. That's right.

Q. What gave you that impression?

A. Well, after Mr. McAllister was appointed Trustee, Mr. Bollenback contacted me to pay it off, so I just dropped the matter and thought that was the end of it and never did any more work on it.

Q. Did the fact that no objections were filed for many years tend to change your impression at all?

A. No complaint of any kind has ever been made to the claim until this year.

Q. Now, Mr. Heider, do you, of your own personal knowledge, know [79] anything about the assets and liabilities of the Rand Truck Line for any of the periods herein involved?

A. Well, generally; not in detail.

Q. What was your understanding of its condition, say in 1944?

A. Well, my understanding was that they were in very good and substantial position—an operating, going concern, getting their assets in promptly and paying current bills promptly.

Q. Did they obtain equipment financing from you from time to time?

A. Considerable, on different items that they needed in their rolling stock, more than anything else. I did, from time to time, finance trailers or

(Testimony of Otto W. Heider.)

trucks or whatever pieces of equipment they wanted.

Q. Generally, how did they keep up their accounts with you? A. Very good; very good.

Q. Do you know what their financial reputation was in the community or communities in which they did business?

Mr. Bollenback: Oh, I object.

A. Well, in my community, Sheridan and Willemina, where they did business, their reputation was excellent.

Q. And did that excellent reputation involve their paying their current liabilities promptly?

A. It did so far as I knew. I had no occasion to know otherwise.

Q. Did you at any time have any information that the Rand Truck Line might be insolvent?

A. No, I knew that they had the fire difficulty, and it was my [80] understanding, because of freight and things that they had in the warehouse, that they did suffer a very substantial loss, but outside of that fire difficulty, I didn't know of any difficulty whatever.

Q. As a matter of fact, Mr. Heider, if you had realized that there might be any insolvency there——

Mr. Bollenback: Oh, just a minute, your Honor. I am going to object to that question, at least.

Mr. Dougherty: Counsel might wait until he hears the question.

(Testimony of Otto W. Heider.)

Mr. Bollenback: I have heard enough of it that I know I am going to object to it.

The Referee: Let him finish.

Mr. Bollenback: Go ahead and complete it for the purpose of the record.

Q. (By Mr. Dougherty): Had you even suspected, Mr. Heider, that the Rand Truck Line was insolvent, would you have continued to loan it money?

Mr. Bollenback: I am going to object to that, your Honor, as being purely a hypothetical question——

A. No.

Mr. Bollenback (Continuing): ——and I ask the witness not to answer until I make my objection. I was stopped in making my objection. Until the objection has been completed I have the right to the same courtesy. I ask that the answer be stricken, your Honor. [81]

The Referee: I think it is going a little far afield. Mr. Heider was financing this company on what he thought to be a secured basis, anyway, so I sustain the objection.

Q. (By Mr. Dougherty): Mr. Heider, did you ever make any advances to this company without any immediate security?

A. No, I think that only a time or two I gave them checks—just what dates and amounts I can't recall, but I think I did without any security just as an accommodation.

Q. But only in a limited number of instances?

(Testimony of Otto W. Heider.)

A. Very limited; very limited.

Q. Did you purchase this mortgage executed by Rand Truck Line—did you purchase it from the payees named in that mortgage?

A. Yes, I purchased it from the payee named in the mortgage.

Q. And they assigned that mortgage to you?

A. Yes, assigned and transferred it to me, and I am the owner and holder of what you call the second mortgage, I guess—note and mortgage.

Mr. Dougherty: If the Court please, the assignment to Mr. Heider is Trustee's Exhibit No. 10, which was here all the time although we didn't know it. Now, this second mortgage, and also the first mortgage, was interest included in the principal amount?

A. In the balance amount due—the original balance the interest was included, that's right.

Q. Was the apparent interest collected in full?

A. No, because when I wrote the second mortgage, as I recall— [82] now, this is 7 years ago, and I haven't looked it up since, but I am just giving you my memory—there was a substantial amount of discount given on the first mortgage when I wrote the second mortgage—approximately \$900. I am not exactly sure of the amount, but there was a substantial amount of discount given.

Q. In other words, is it correct to say, Mr. Heider, that you gave them a receipt for moneys which you, in fact, did not receive?

A. Yes, because there were some payments yet

(Testimony of Otto W. Heider.)

to accrue on their first mortgage, and writing up the second mortgage they would be entitled to a refund on that unearned interest, so to speak.

Q. Referring to a group of papers marked Trustees' Exhibit No. 26, does that show an occasion where you gave him credit of \$960 in interest which was not, in fact, collected?

A. That is what I had in mind. I hadn't seen that for 7 years, but 960 was the amount. That's right. That is on what we would call the first mortgage.

The Referee: That is all that was unearned at the time you rewrote the mortgage in '46?

A. That's right; \$960 is unearned interest. It is marked here on the last payments of the mortgage.

Q. (By Mr. Dougherty): Were the installment payments on the mortgage delinquent at any time?

A. Oh, yes; they were delinquent at different times, which I wasn't concerned about particularly. They did get behind. [83]

Q. Did you charge any additional interest on the delinquent payments?

A. No, I didn't; I didn't charge them any additional interest on the delinquent payments.

Q. Is it correct to say, then, that there would have been additional interest due which wasn't collected?

Mr. Bollenback: I am going to object to that as being a conclusion unless he can show dates and times and amounts——

A. The note should provide——

(Testimony of Otto W. Heider.)

Mr. Bollenback: Just a minute. Unless he can produce the dates, the amount of interest, the time that it was past due, and how much interest was charged or would have accrued, to say that some other interest would have accrued is merely a conclusion.

The Referee: I think I am going to have to sustain that objection.

Mr. Dougherty: If the Court please, of course the reason that we cannot produce the records is because of the delay in making the objections.

The Referee: Isn't there a record of when these payments were made?

Mr. Dougherty: This appears to be a partial record, your Honor, and it does show that they were made at odd times—weren't made with particular regularity, and it does show that some payments were skipped, but I don't believe that it is a complete record. [84]

The Referee: Well, that record may be considered in connection with your question. Is that record an exhibit?

Mr. Dougherty: Yes, your Honor. They all have exhibit numbers.

The Referee: All right, that is fine.

Mr. Dougherty: Well, they all have exhibit numbers but this one page seems to have become detached.

The Referee: Keep them together, then.

Q. (By Mr. Dougherty): What was the amount of the obligation due and unpaid, Mr. Heider?

(Testimony of Otto W. Heider.)

A. At the time I filed the claim, twelve thousand-something. I have got a copy in my files here of the claim. You have the claim there. I know that the amount in the claim is correct—proof of claim.

Q. Was the proof of claim prepared from your books and records? A. At that time, it was.

Q. Were those books and records kept in the ordinary and regular course of your business?

A. They were.

Q. Were all of the entries made in those books and records made by you personally?

A. By me, personally and Miss Lawrence, who was working for me for thirty years.

Q. If they weren't made by you personally, were they made under your supervision? [85]

A. Yes, they were, in my office.

Q. And did the claim, as made, reflect those records? A. Just exactly as they were.

Mr. Dougherty: No further inquiries, your Honor.

Cross-Examination

By Mr. Bollenback:

Q. Mr. Heider, are you a member of the Oregon State Bar? A. Yes.

Q. How long have you been practicing law in the State of Oregon?

A. Oh, I don't know, about forty years, pretty close.

Q. You were first admitted in what year, do you remember?

(Testimony of Otto W. Heider.)

A. '15, but I didn't practice there for part of the earlier years very much, that is, the first five years.

Q. Well, you have been a continuous member, then, for about 41 years, is that right?

A. Well, I will in August of this year.

Q. Now, you say that you didn't have any knowledge that the Trustee was going to object to this claim of yours until January, 1956, is that what I understood you to say?

A. Yes, Mr. McAllister—

Q. Just a minute. Answer me, "Yes" or "No." Is that what you say?

Mr. Dougherty: If the Court please—

Q. (By Mr. Bollenback): Now, you can explain if you want to, [86] but I want an answer first.

Mr. Dougherty: If the Court please, I will object to counsel arguing with the witness.

The Referee: You need not argue.

Q. (By Mr. Bollenback): January, 1956?

A. Yes, I received the objection January, '56.

Q. And that was the first you knew that the Trustee was going to object to this claim?

A. Well, I think that was the first objection ever served on me, except the Circuit Court procedure.

Q. There was a Circuit Court lawsuit against you, wasn't there? A. It is still pending.

Q. In which the Trustee is seeking to obtain 40,000 or more from you, is that right?

A. And some other defendants, too.

Q. And it grows out of this same transaction, doesn't it? A. Yes.

(Testimony of Otto W. Heider.)

Q. And did you think that the Trustee was going to sue you for \$40,000 and still not object to your claim for \$11,000? A. As a matter of fact——

Q. Just answer me, “Yes” or “No.”

I would like to have the reporter read the question and the witness give a yes-or-no answer and then make any explanation he desires, but a yes-or-no answer first.

Mr. Dougherty: I must instruct you, Mr. Heider, that if [87] it is a question impossible to answer by “Yes” or “No,” then you need not so answer it.

(The question was read.)

A. That answer has to be qualified.

Mr. Bollenback: Well, go ahead and answer.

A. Mr. McAllister and I have been taking this up with one another for a considerable time towards settlement and compromise and we talked it over at different times over the last seven years, and I never did think that the lawsuit in the Circuit Court was brought in good faith and with any intention of ever recovering on it. In fact, I was positive of that, that it was never procured with any intention of continuing in good faith against any of the defendants, but it was simply to cover up a claim that I had filed in this court. That was the only purpose of the lawsuit in the Circuit Court, and that has been ascertained by the case being thrown out of court several times since you filed it.

Mr. Bollenback: Well, now, just read the question again, and I ask the Court to have the witness

(Testimony of Otto W. Heider.)

answer the question "Yes" or "No." He has given his explanation; now I would like to have an answer.

(The question was reread as follows: "And did you think that the Trustee was going to sue you for \$40,000 and still not object to your claim for \$11,000?") [88]

A. Yes, I did.

Q. (By Mr. Bollenback): Now when did the Internal Revenue first show an interest in your books?

A. In December, 1950.

Q. In December, 1950? A. Yes.

Q. Now this hearing was had in July of 1949, isn't that right?

A. Yes.

Q. And you were asked by the Court to produce all your books and records concerning this transaction, weren't you? Answer me "Yes" or "No."

A. Well, not until after they had a hearing. We never had a subsequent hearing before that. I was asked to bring out records at a subsequent time.

Mr. Bollenback: Read the question again, please.

(The last question was read.)

A. As far as it was possible to do so, yes.

Q. (By Mr. Bollenback): All right, so you did.

A. No, not all of them.

Q. In other words, you disobeyed the Court's instructions?

Mr. Dougherty: If the Court please, I must object to counsel misrepresenting the record. The Court instructed Mr. Heider to bring an itemized statement of receipts and disbursements and the

(Testimony of Otto W. Heider.)

Court did not request or instruct Mr. Heider to bring all of his books and records, and counsel well knows [89] what the record shows.

Mr. Bollenback: I shall read what the record shows, reading from Referee's statement on page 4 of the transcript, quoting from the Referee—referring back to page 3: "Now, at the time Mr. Heider sent up this proof of claim he wrote me a letter in which he asked whether it would be necessary for him to appear today in view of the fact that he had filed his proof of claim, and I wrote acknowledging receipt of the claim and of his letter. I said, 'The claim is deficient in that you did not include therein an itemized statement of monies disbursed or received by you in connection with any transactions or payments made in connection with said mortgage or the prior mortgage executed September 18, 1944.' In that I was following the language of the order. I said, 'Please bring such a statement with you at the hearing scheduled in my courtroom on Wednesday, July 6, 1949, at 10:00 o'clock a.m. Also bring with you your original records showing receipts and disbursements in connection with the two mortgages. The hearing set for next Wednesday is for the purpose of receiving proof of the balance due on your mortgage and of all transactions in connection with it so that the Court may determine the validity of the mortgage and the amount owing thereon.' "

Q. Now, did you, in response to that request of the Court, produce your original records?

(Testimony of Otto W. Heider.)

Mr. Dougherty: Now if the Court please—— [90]

The Referee: I think you did, didn't you—those checks and everything?

A. Yes, as far as I could at that time.

The Referee: Well, how do you answer the question? He asked you whether you produced them or not.

A. Well, yes, so far as I could get them together at that time.

Q. (By Mr. Bollenback): And the interference of the Internal Revenue did not occur until after that time?

A. Well, not until after that hearing, no.

Q. Now did you ever loan any money to Bob Rand before the Markees took the Rand Truck Line over?

A. Personal loans to him?

Q. Corporation loans.

A. I believe these loans we are talking about are the only loans—these two to the Rand Truck Line corporation were the only loans I ever made them.

Q. Well, I got the impression that you had made other loans and that they had established a credit with you.

A. To Bob Rand?

Q. Yes.

A. Well, just on vehicles, just like I told you before, just for trucks or trailers or rolling stock.

Q. You had loaned money to Bob Rand for trucks and trailers?

A. Well, to the Rand Truck Line. Bob Rand was the principal [91] owner.

Q. Now you say you thought that they were

(Testimony of Otto W. Heider.)

solvent? A. I knew they were solvent.

Q. You knew they were solvent?

A. Yes, I knew they were solvent.

Q. But you had some difficulty getting payments from them, didn't you?

A. No, I didn't have any particular difficulty. The only difficulty I had was once in awhile they would ask me to hold a check until they got in their monthly bills, sometimes. A check might be a few days overdue, so to speak, before they got in their collections, and I think I did hold up the check.

Q. In other words, they weren't very solvent if you had to hold their checks?

Mr. Dougherty: Object——

A. They had a very solvent record in my community.

Q. (By Mr. Bollenback): Did you ever examine the books of the corporation?

A. I am not a bookkeeper or auditor.

Q. Just answer the question. A. No.

Q. You never did?

A. Oh, I have seen some of the books but I never made an examination of them.

Q. How did you know they were solvent then? [92]

A. Because I knew they paid their bills promptly.

Q. Did you know their assets exceeded their liabilities?

A. Well, these books show that their assets exceeded their liabilities.

(Testimony of Otto W. Heider.)

Q. At what time, Mr. Heider?

A. Well, in '44 and '45 and '46.

Q. Taking your mortgage into consideration?

A. Well, taking any of their liabilities into consideration, I would say.

Q. Do you realize that this first mortgage that you took did not appear on the corporation books for about two and a half years after it was executed?

A. I didn't keep the books of the company at any time.

Q. Did you notice in your examination of these books that that didn't show up on the corporation liabilities? A. I never checked that at all.

Q. Then you didn't know whether they were solvent or not, did you?

A. Well, I knew they met their obligation to me, is all.

Q. Now you mentioned that you had negotiated with Mr. McAllister to compromise this claim.

A. We discussed it several times. We never arrived at any figure, we never agreed on any amount.

Q. Did you ever make an offer?

A. And neither did he ever make an offer to me —I mean a [93] firm offer.

Q. Did you ever make an offer to him?

A. I don't think he ever asked me to make a definite offer.

The Referee: I don't think I should consider this.

Mr. Bollenback: It isn't proper, your Honor,

(Testimony of Otto W. Heider.)

but he brought it up. It isn't a proper part of the testimony but he raised the question.

Q. Mr. Heider, do you remember when you were served with the complaint and summons in the Circuit Court suit with relation to the taking of this deposition on July 6, 1949?

A. Oh, it was some time afterwards. I could guess.

Q. Do you have your file with you on that case?

A. When the first complaint was filed?

Q. Yes.

A. I think it was five or six years ago.

Q. Let's get the date that first complaint was filed or the date of your first appearance in the case.

A. I think it was in '47.

Mr. Dougherty: My file goes back to a complaint which was filed on September 3, 1952.

Mr. Heider: Oh, it was prior to that.

Mr. Dougherty: I don't have the first complaint.

Mr. Heider: Mr. Bollenback should have it. I think he prepared it.

Mr. Bollenback: My files of the Rand Truck Line are [94] voluminous and I didn't bring that one with me.

Mr. Heider: Maybe I can give you the date if you want it. I think there have been five amended complaints filed, and I think you are due now for another one. (Looking through file.) Here are some papers back in 1950, so I know it was six years ago.

Mr. Miller: Perhaps we can stipulate for the record that whatever the court record in Mult-

(Testimony of Otto W. Heider.)

nomah County shows is the original filing date. Is that right, Mr. Dougherty?

Mr. Dougherty: Yes. I am certainly not stipulating, though, that those first few amended complaints would put him on notice.

Mr. Miller: All I am asking is whether the commencement of a suit, whether you liked it or not, was made on a certain date.

Mr. Dougherty: Now please let's keep this on a professional basis.

The Referee: That will be understood.

Q. (By Mr. Bollenback): Did you turn any records involving this transaction over to the Bureau of Internal Revenue?

A. They had all of them, checked the figures completely.

Q. Concerning this transaction?

A. Exactly.

Q. They took your original records?

A. They did, my original books and records and checks. Any, of course, they couldn't get, I told them where the records [95] were on file down here. I don't know if they came here and checked them over.

Q. What papers did you turn over to them involving this transaction—what records did you turn over? A. These files right here, 1, 2, 3.

Q. And what else?

A. And my own bookkeeper's books—original records.

Q. Original records on this transaction?

(Testimony of Otto W. Heider.)

A. On this and other transactions.

Q. Did you get those books back?

A. I got some of them back.

Q. Did you get them back on this transaction?

A. I don't think I did.

Q. Do you remember at the time of the taking of this other deposition when you insisted that these yellow sheets were the only ones in your original transaction?

A. Well, I had these files here.

Q. Just answer my question.

A. They were records of payments, yes.

Q. They were your original records?

A. Yes, they were my original records, but some of the notations on those records were probably put on other books, but they were my original records that I had here before.

Q. And they were in the Bankruptcy Court?

A. I told them where they were. Whether they called on [96] Mr. Snedecor and got them, I don't know, but they knew where they were.

Q. Did you turn any cancelled checks over to them?

A. Not on this transaction in particular, but all of them. If there were any that weren't here they had them.

Q. Did you turn any other cancelled checks over to them that involved this transaction?

A. I don't know that I turned any others because I think most of the checks have been introduced here.

(Testimony of Otto W. Heider.)

Mr. Bollenback: That is all.

The Referee: Do you have any further questions?

Mr. Dougherty: Yes, if the Court please.

Redirect Examination

By Mr. Dougherty:

Q. Isn't it a fact, Mr. Heider, that none of the first two or three complaints——

Mr. Bollenback: Now, if the Court please——

The Referee: Go ahead.

Q. (By Mr. Dougherty): Isn't it a fact, Mr. Heider, that none of the first two or three complaints filed by the Trustee raised any of the issues raised by these objections here?

A. Well, that is my understanding.

Mr. Bollenback: Just a minute. Just a minute. I am going to object to that as calling for a conclusion of law.

Mr. Dougherty: You have qualified the witness as a lawyer [97] with 41 years' experience.

Mr. Bollenback: Produce your evidence, then. Put your pleadings in evidence if you want to, but let's not have conclusions of law.

Mr. Dougherty: I am asking Mr. Heider as a matter of fact——

Mr. Bollenback: I am objecting to the question. Put the pleadings in evidence. That is the best evidence.

The Referee: I will let him answer it, I think,

(Testimony of Otto W. Heider.)

and you may submit your pleadings into evidence if you like.

A. That is my recollection of the matter, that these objections weren't raised in those first complaints, and I haven't checked them for a long time but that is my recollection of it.

Q. (By Mr. Dougherty): Let's take the one matter of usury. Isn't it a fact that Mr. Bollenback didn't introduce that into this litigation until just a couple of years ago?

A. That's right, that's correct.

Q. And that is only one example.

Mr. Bollenback: I suggest that Mr. Dougherty be sworn.

Mr. Dougherty: If the Court please, I should like to go back now and do something which I should have done on direct examination.

The Referee: You may proceed.

Mr. Dougherty: I will ask the reporter to mark these six pieces of paper.

(Thereupon, two original checks and three carbon copies of checks purporting to have been executed by Otto W. Heider to Rand Truck Line or to Rand Truck Line and others, in the year 1946, and a note executed by Floyd L. Long, dated May 15, 1944, was marked Claimant's Exhibit No. 30 for identification.)

Q. (By Mr. Dougherty): Mr. Heider, I show you 6 documents marked Claimant's Exhibit No. 30

(Testimony of Otto W. Heider.)

for identification, and ask you if you will tell us what those are.

A. Those are payments to the Rand Truck Line corporation in '46 and these carbon checks are exact duplicates of the original checks, and this note here, Floyd L. Long, dated May 15, 1944, was one of the obligations that was written into what we call the, as I recall—into the mortgages that are involved, and these two checks were on other transactions but were eventually incorporated into what we call the last mortgage.

Q. May the originals of some of these carbon copies be in evidence already?

A. I think they are. The originals of the carbon copies, I think are already in evidence.

Mr. Dougherty: We offer Claimant's Exhibit No. 30, your Honor.

Mr. Bollenback: I would like to see it, please.

I would like to ask the witness a preliminary question, your Honor. [99]

Why did you hold these checks back without introducing them before?

A. Couldn't find them.

Mr. Bollenback: I mean today.

A. I had them here all day long.

Mr. Bollenback: Why did you claim that the Bureau of Internal Revenue had your cancelled checks and you couldn't produce any more evidence?

Mr. Dougherty: The witness made no such claim.

(Testimony of Otto W. Heider.)

Mr. Bollenback: Well, then his attorney did.

Mr. Dougherty: That is false likewise.

A. I didn't have all my records. I had about nine-tenths of them.

Mr. Bollenback: Now, if your Honor please, this is all under one exhibit and I don't know what I am going to do about all these checks. For the record we will object to any of this evidence going in on the ground it should have been introduced on the examination in chief rather than on redirect. It just appears that this witness was holding these documents back with the idea of not using them until he found it was necessary to use them, and then he produces some checks.

Now just a minute. I am not through.

And on the further ground that he has, by his own statement made not 15 minutes ago, said that he was unable to produce any further books and records because the Bureau of [100] Internal Revenue had taken his cancelled checks and had not returned them to him, and furthermore as to one of these documents—it is a note to Page & Page and made by a man by the name of Floyd Long, and neither Rand Truck Line nor Otto Heider shows up on the document, and what it has to do with this case is something I don't know, but I think that the bad faith of this man producing these checks at this late date, in view of his previous claims, is enough to discredit the entire transaction.

(Testimony of Otto W. Heider.)

Mr. Dougherty: If the Court please, first as to why they were not introduced before, they were before me and were covered up in a mass of papers. It is my oversight. Secondly, as to the statements of the witness, they have been merely that he is not now able to produce as much evidence as he would have been able to seven years ago. He has not made any claim that he wasn't able to produce any evidence now. Thirdly, with respect to the note to Page & Page, signed by Long, the witness' testimony was that that was some evidence of an equipment transaction which was included in his transaction with Rand Truck Line, and I should like, if there is any question about that, to examine the witness further with regard to that.

The Referee: Supposing you do that.

Mr. Bollenback: I suggest they separate the exhibit, your Honor, and mark that separately from the rest of them, but we also would like a ruling from the Court on our first objection, [101] that it should have gone in on direct examination.

The Referee: I am not going to take technical advantage of counsel and say that it cannot be introduced. The Court is quite liberal in allowing testimony to go in. I would allow the same to you. I do suggest that you make the checks one exhibit and help the Court by telling us what the purpose of them is, because I happened to be reading the record at the time you introduced them.

Mr. Dougherty: Yes. Then the five checks are

(Testimony of Otto W. Heider.)

marker Claimant's Exhibit 30. We have removed the note from the Claimant's Exhibit 30. They are checks from Otto Heider to Rand Truck Line, or copies of checks—that is, carbon copies of checks from Otto Heider to Rand Truck Line for various sums of money, all dated in 1946, and it was the witness' testimony that these represent advances made by Otto Heider to Rand Truck Line, which advances are reflected in the mortgages under consideration.

The Referee: Those were to enable them to purchase some equipment?

A. Yes, it was, and then when we made the second mortgage this was all picked up in the second mortgage—these checks were, and that note, too, of Mr. Long likewise represented equipment which was sold to the Rand Truck Line and I paid it off.

The Referee: All right. [102]

Q. (By Mr. Dougherty): Taking the check of March 19, 1946, for \$2,500, payable to Rand Truck Line, was that money advanced to them in connection with their purchase of a new Fruehauf van?

A. Yes, 24-foot, all-steel—a new van—4-wheel van.

Q. Well, tell us about any of the conditions.

A. This was for the purchase of a used '41 van.

The Referee: What is the amount of that check?

Mr. Dougherty: That is \$2,500.

Mr. Bollenback: Clear it up in my mind, Mr. Heider. Are these transactions in addition to the two mortgages, or what?

(Testimony of Otto W. Heider.)

A. No, they were incorporated in the mortgage.

Mr. Bollenback: In what mortgage?

A. In the last mortgage.

Mr. Bollenback: Oh. Both of them?

A. This one was incorporated in the first mortgage (indicating), but these were incorporated in the last mortgage.

Mr. Miller: Will you identify them for the record?

Mr. Dougherty: The one which has not been offered yet is the note.

The Referee: Well, as I understand it, after you had the first mortgage you assisted them in the financing of some additional equipment and had either conditional sales contracts or chattel mortgages on the equipment, and then you consolidated those when you took the second mortgage, with the original indebtedness which was given by the company to the stockholders [103] for the purchase of the stock.

A. Between the two mortgages, if you want to call it that way, I financed additional equipment.

The Referee: Yes, that's right. The Court understands it. The checks may be received in evidence.

(Thereupon, the five checks heretofore marked Claimant's Exhibit No. 30 were marked as received in evidence.)

Mr. Bollenback: I haven't examined them.

(Testimony of Otto W. Heider.)

The Referee: You may cross-examine later.

Mr. Dougherty: Will you mark this, please?

(Thereupon, a document purporting to be a promissory note executed by Floyd L. Long in favor of Page & Page Trailer Company on May 15, 1944, in the amount of \$3,786.00, was marked for identification as Claimant's Exhibit No. 31.)

Q. (By Mr. Dougherty): I hand you a note dated May 15, 1944, marked Claimant's Exhibit No. 31, and ask you if you can tell us what that is.

A. Well, that was made by Mr. Long to Page & Page Trailer Company, that manufactures here in Portland a Page trailer, and Mr. Long could not pay out on this note and the trailer was taken over by Rand Truck Line and this was incorporated into their mortgage, as Floyd L. Long lived at Grand Ronde and became insolvent and I did take the equipment back when I sold [104] it to Rand Truck Line, and then when they made the first mortgage they picked this up.

Q. So this is just some evidence of one of the items that went into the first mortgage?

A. Yes, that's right, and Mr. Long still lives at Grand Ronde, Oregon, the man that signed the note.

Mr. Bollenback: I never heard of the transaction before. I am going to object to it.

The Referee: What is the amount of it?

Mr. Bollenback: \$3,786.00, and it doesn't say how much—unless this witness is contending that he

(Testimony of Otto W. Heider.)

paid for the benefit of Rand, this entire amount, it is still incompetent and irrelevant. It doesn't prove anything. A. I didn't claim that.

Mr. Bollenback: Well, I am going to object to it until the transaction is aired.

A. I can explain it.

The Referee: Well, do you want the Court to understand that the mortgage given——

A. By Long.

The Referee: No, not that—the mortgage given to Mrs. Rand and assigned to you includes this indebtedness? It is the first time I have ever heard of it.

A. It is the first mortgage, not the second mortgage.

The Referee: The first mortgage is the one we are talking [105] about.

A. Yes, this indebtedness was included in the first mortgage, not the second mortgage.

The Referee: Who owed that indebtedness?

A. Well, I haven't got the mortgage any more. I forget how it was executed. Rand Truck Line owed the indebtedness.

The Referee: It was made payable to Mrs. Rand?

A. Well, made payable to Mrs. Rand and then assigned to me.

The Referee: Yes, but did the company owe Mrs. Rand some money?

A. I have forgotten the first mortgage. May I see the first mortgage a minute? I think I can clear

(Testimony of Otto W. Heider.)

that up if I can see the first mortgage. I think it is here. I returned the first mortgage to the Rand Truck Line when it was paid off by the renewal, and it is the one that is dated—I don't have that mortgage any more.

The Referee: Well, there is a copy of the mortgage there. Now, that mortgage was given to Mrs. Rand for the purpose of financing the purchase of the stock. How would that have anything to do with the note on some repossessed equipment?

A. It covered additional obligations besides what I did advance to the Rands. Mr. Rand testified that I paid him \$32,000, but it included an additional amount beside the \$32,000, and it was written into this mortgage. I consolidated it all into this mortgage because Mrs. Rand was not obligated on [106] this mortgage to pay it at all, and I consolidated some other indebtedness into this mortgage.

The Referee: No, you didn't in the first, did you? Did you in the first? You did in the second.

A. Yes, I did in the first as well as the second mortgage.

The Referee: And what are the items made up in the first mortgage, then? What are the items made up in Mrs. Rand's mortgage that you put in there?

A. Well, \$32,000, the checks, and some cash which Mr. Rand had in addition to the checks, and then not all of this note was in there but there had been some payments on it. I can ascertain, I think.

The Referee: I am going to sustain the objection

(Testimony of Otto W. Heider.)

on that offer, unless you can give me some more specific information from your records as to that.

A. I think I can get the information from my office.

The Referee: We may have oral argument. I can't accept that note as being any evidence with the vague statement of the witness. If you can get something specific for me you may do so, Mr. Dougherty, but it is too vague for me to understand.

Mr. Dougherty: It is my understanding, your Honor, that in this financing it was contemplated that Mr. Heider was going to loan the money to Rand Truck Line. Rand Truck Line already owed him some money.

The Referee: Well, then, I would like to have that [107] evidence. I will give you an opportunity to produce it if there is any evidence that at that time they owed Mr. Heider any money and it was incorporated in this obligation. I think it would be quite important to know that.

Mr. Dougherty: Well, we will do so with all of the evidence that we can on that point. Whether or not we can produce any, I don't know, your Honor. I suggest that 7 years ago such evidence could have been offered.

The Referee: I don't recall it ever being in any other testimony before.

Mr. Bollenback: May I ask the witness some questions, your Honor?

The Referee: Yes.

(Testimony of Otto W. Heider.)

Mr. Bollenback: Mr. Heider, at the time of the first hearing did you or did you not produce \$36,500 worth of checks and say that was what you gave for that first mortgage?

A. I think there were that many checks produced at that time.

Mr. Bollenback: Yes, and you said that was what you gave for the mortgage, isn't that right?

A. Well, this was also——

Mr. Bollenback: Just answer me. Isn't that what you said you gave for that mortgage at that time?

A. That amount in checks, I think.

Mr. Bollenback: And that the balance was with interest at 10 per cent. compounded [108] semiannually?

A. I might find the note and mortgage here. I will try.

Mr. Bollenback: I have another issue I would like to raise, your Honor, on this point.

Are you looking for something in particular, Mr. Heider?

A. Well, no. I can answer your question.

Mr. Bollenback: All right. I want to call your attention to the Earl Walden mortgage. So you won't be misled, I want to hand you Trustee's Exhibit 4, the Earl Walden mortgage. Now, that was a mortgage for \$1,080, payable in one year, is that right?

A. Yes.

Mr. Bollenback: And that included prepaid interest, did it not?

A. That's right.

(Testimony of Otto W. Heider.)

Mr. Bollenback: At what rate was the interest included?

A. I think the same as the others, 10 per cent.

Mr. Bollenback: Compounded semiannually?

A. Yes, I think it was.

Mr. Bollenback: Now, I want to hand you a check of a thousand dollars that you have just introduced in evidence, payable to Rand Truck Line or Earl Walden, and ask you if that is the check which you advanced in return for that mortgage.

A. Yes, there was another item there, though, that went into that besides this check. [109]

Mr. Bollenback: What was that?

A. I think there were some attorney's fees for services. I think I explained that to you originally.

Mr. Bollenback: Did you keep a ledger account of the services that you rendered to the Rand Truck Line?

A. Oh, I rendered services for them from time to time.

Mr. Bollenback: Answer my question.

Will the reporter read the question?

(The last question was read.)

A. I don't remember whether I kept one or not. I may have.

Mr. Dougherty: Are you through, Mr. Bollenback?

Mr. Bollenback: Beg pardon?

Mr. Dougherty: Are you through on that?

(Testimony of Otto W. Heider.)

Mr. Bollenback: No, I am not. I wanted him to answer that last question.

The Referee: He did answer.

Mr. Bollenback: What was it?

(The last answer was read.)

Mr. Bollenback: What services would you be rendering them in that connection, Mr. Heider?

A. Oh, matters we would take up with the Public Utilities sometimes, and routes, and things—just various matters when they would drop in there and ask for advice.

Mr. Bollenback: And how much was the fee that you charged that went into this transaction? [110]

Mr. Dougherty: Now, just a moment. He hasn't testified that he charged any fee. He said that that might be an explanation.

Mr. Bollenback: Well, what is the explanation, then, that you want to accept or admit?

Mr. Dougherty: Well, I want the explanation which was on the instrument itself, that this is the part over deductions, plus cash at various times.

Mr. Bollenback: All right, explain that, Mr. Heider.

A. (Reading): "Part over deductions plus cash, various."

Mr. Bollenback: Explain that.

A. Explain it?

Mr. Bollenback: Yes.

A. Well, it says here, "Part over deductions." I just told you it was probably for services.

(Testimony of Otto W. Heider.)

Mr. Bollenback: All right. What deductions?

A. For services rendered.

Mr. Bollenback: How much?

A. Well, probably \$30 or \$40.

Mr. Bollenback: For what?

A. Oh, for various and sundry matters.

Mr. Bollenback: For instance?

A. Oh, in regard to routes and one thing and another.

Mr. Bollenback: What did that involve?

A. What route did this involve? [111]

Mr. Bollenback: Yes.

A. I can't tell you now.

Mr. Bollenback: Yes, that \$35 item.

A. I can't tell you what route the matter involved—just things that might come up from time to time that they might ask about.

Mr. Bollenback: Did you ever bill them for it?

A. They paid it right there.

Mr. Bollenback: Did you ever send them a bill for services rendered?

A. No, they were in my office every week or two.

Mr. Bollenback: They were in there on your business, weren't they, Mr. Heider?

A. They were there on their business, too.

Mr. Bollenback: Did you ever appear before the Public Utilities Commission on behalf of the Rand Truck Line?

A. I had some correspondence with them.

Mr. Bollenback: Did you ever appear before the

(Testimony of Otto W. Heider.)

Public Utilities Commission in behalf of the Rand Truck Line?

A. I don't think I ever appeared before them.

Mr. Bollenback: Are you licensed to practice before the Public Utilities Commission?

A. I think I don't have to be admitted to write them letters.

Mr. Bollenback: Answer the question, please.

A. I have no special admission certificate that I know of. [112]

Mr. Bollenback: And you have never, as I take it, appeared before the P.U.C.?

A. Oh, yes, I have.

Mr. Bollenback: All right, when and where did you appear before them in relation to the Rand Truck Line?

A. No, I never attended a hearing for the Rand Truck Line, but I have on other matters.

Mr. Bollenback: Is it still your position that some of your checks are missing involving these Rand Truck Line matters?

A. I didn't claim that there were any missing, did I?

Mr. Bollenback: It is my understanding that you are claiming that the——

Mr. Dougherty: If the Court please, counsel has consistently misstated the record. I consider it a most unprofessional thing to do. What Mr. Heider has said——

(Mr. Bollenback laughed.)

(Testimony of Otto W. Heider.)

Mr. Dougherty: ——and if counsel approves of his unprofessional conduct that is his choice—what Mr. Heider has said is that he cannot now produce as much evidence as he could have, had not Mr. Bollenback been guilty of laches in this matter.

Mr. Bollenback: All right, Mr. Heider, what evidence can't you produce now that you could have before?

Mr. Dougherty: How can he know? He knows that his files are missing.

The Referee: I think I have heard enough on this matter [113] of laches.

Mr. Heider: If the Court will give me an opportunity on what the Court asked about this mortgage on this loan, if they will consent to it, I think I can go through old files at Sheridan and send it to the Court.

The Referee: I think when we have finished this we will ask for briefs on certain matters of law and probably oral argument. At that time if you have some additional evidence you want to produce you may do so.

Mr. Dougherty: Should we withdraw that at this time, your Honor?

The Referee: Yes.

Mr. Bollenback: Withdraw what?

The Referee: That note.

Mr. Bollenback: Well, you haven't got it. It isn't in—the Long note.

Mr. Dougherty: It is in that group of papers, Mr. Bollenback.

(Testimony of Otto W. Heider.)

Mr. Bollenback: All right, you find it.

Mr. Dougherty: Why all these petty objections? That is what I was prepared to do.

Mr. Heider: I can either find the mortgage or get a certified copy of it, the mortgage that goes with that transaction.

Mr. Dougherty: I suggest counsel withdraw his notes from the exhibits. [114]

Mr. Bollenback: All right.

The Referee: Does anyone have anything further?

Mr. Heider: Here it is (producing the note).

Mr. Bollenback: Seriously, I have some more questions to ask this witness. Do you have anything you want to take up, Mr. Dougherty?

Mr. Dougherty: No.

Recross-Examination

By Mr. Bollenback:

Q. Now, Mr. Heider, you have now made a statement that this original mortgage included some obligations of the Rand Truck Line in addition to the money that you advanced to the Rands or paid to the Rands. A. That is my understanding.

Q. Then when this mortgage was drawn, or before it was drawn, you knew you were going to take it over, didn't you?

A. I had no sure proof of it. I do buy mortgages; I don't any more, but I did then.

Q. Well, if you didn't know it was going to be

(Testimony of Otto W. Heider.)

taken over by you why did you include in it some other obligation that the Rand Truck Line owed you? A. You say why did I include it?

Q. Yes.

A. Because they were consolidating their debts as far as they could at that time. [115]

Q. Well, then you knew that you were going to take it?

A. Oh, I very likely understood I would buy it. I didn't buy it at the time it was drawn, but it was very likely understood because it was drawn in my office, so that is very likely proof I would take it.

Q. And included in there is an obligation you say the Rands owed at another time?

A. On some equipment.

Q. And as a part of this whole transaction there was an endorsement by Mrs. Rand without recourse, is that right? A. Yes.

Q. You never intended to look to the Rands?

A. I never intended to look to the Rands personally, let's say; no, I didn't.

Q. Now, Mr. Heider, what are the allegations that are contained in that first complaint filed over in the courthouse?

A. Well, I have been looking for it, Mr. Bollenback.

Q. Well, you testified that there isn't anything in there that was of any consequence. Just tell us what was in there.

Mr. Dougherty: If the Court please, to shorten this we will get photostats of the pleadings.

(Testimony of Otto W. Heider.)

The Referee: Yes, we will have those introduced.

Mr. Miller: Counsel was able to state as an expert a conclusion as to what was in there. We would like to have him.

The Referee: I would rather have them made a part and I [116] can tell.

Mr. Bollenback: I would like to ask this witness another question as an expert, your Honor.

Q. Isn't it a fact, Mr. Heider, that usury is not an affirmative matter but is a defense?

A. There is no usury involved in this case.

Mr. Dougherty: As a conclusion of law Mr. Bollenback's statement is false and has been ruled to be inaccurate by the Circuit Court of the State of Oregon.

Mr. Miller: We asked for the expert opinion of the witness, not his counsel.

Mr. Dougherty: I cannot stand back and allow Mr. Bollenback to try to confuse Mr. Heider on a matter of law which Mr. Bollenback has already lost in the Circuit Court.

Mr. Bollenback: I am glad there is a higher court.

Q. Mr. Heider, do you have a copy of your claim there? A. The first complaint?

Q. Do you have a copy of your claim there?

A. It is right here.

Q. A copy of your claim? A. That I filed?

Q. Yes, do you have that there?

The Referee: The original claim is there. I handed it to Mr. Dougherty awhile ago.

(Testimony of Otto W. Heider.)

A. I will identify the claim if you think it isn't properly [117] identified.

Q. (By Mr. Bollenback: Here it is, Mr. Heider. Why did you insert in this claim the statement, "Affiant further states said debt herein proven and this claim are free from usury, as defined in the laws of the State of Oregon wherein the debt was contracted"?)

A. Free from usury?

Q. Yes, because it is a fact you knew at the time the claim was filed, at that time in June, 1949, that usury was being claimed in this, didn't you?

A. In the first complaint? I was just looking for a copy of the first complaint and I don't recall that you mentioned usury.

Q. In June, 1949, you filed a claim with the Bankruptcy Court in which you make the statement that the claim is free from usury.

A. I copied that out of a form book now, and that was part of the form.

The Referee: Let me have that claim.

A. I think that was copied out of a form book.

Q. (By Mr. Bollenback): You did say in your statement previously that you had computed interest at 10 per cent compounded semiannually, didn't you?

A. Yes, I did.

Mr. Dougherty: Mr. Heider, you didn't say that that is the way the interest actually paid would work out. [118]

A. No.

Mr. Dougherty: Because in fact, some of the interest that was computed wasn't, in fact, paid.

(Testimony of Otto W. Heider.)

Mr. Miller: Your Honor, he is his client and he is an attorney and he is leading him right down the way.

The Referee: Well, most of this seems to be argument between counsel instead of testimony. You can make your arguments later. Is there anything else?

Mr. Bollenback: I hope to submit a memorandum of authority, your Honor, not with the idea that it is exclusive. I might want to put in some more, but fundamentally and basically it sets out the Trustee's position. I don't think that there is any need or reason to go into a long extended argument at this time. I do feel that a summary of the facts in this case is going to be quite important and I would ask the Court to give me permission to take the deposition of Mr. Heider out of the office here and prepare a summary of fact from that and the exhibits—I can get the exhibits here—with transcript references, and I will serve a copy on counsel.

The Referee: Well, I suggest that you supplement your brief by a summary of the facts which you claim are now in evidence and then that will give counsel for Mr. Heider an opportunity to summarize the facts as he sees them or to object to any facts that you state are a part of the record, and also answer your memorandum. Is that satisfactory, Mr. Dougherty? [119]

Mr. Dougherty: Thank you, your Honor.

The Referee: Now, there are one or two things left open. The question of the admission of the testi-

(Testimony of Otto W. Heider.)

mony of Vern Markee, which is a part of the transcript of the previous hearing. Objection has been made to it. Mr. Dougherty, do you still object to it?

Mr. Dougherty: If the Court please, I have confidence that the Court can extract the relevant parts of it. There are parts that are not particularly relevant to this particular controversy, but we withdraw our objection.

The Referee: All right, then, that will be so understood. Mr. Heider is going to send in a certified photostatic copy of the first mortgage, which will be given an exhibit number. What will the next exhibit number be?

The Reporter: 32, your Honor.

The Referee: And do you desire to introduce copies of any of the complaints—of the first complaint over there?

Mr. Bollenback: We might reserve the right to, your Honor. I don't know if, after further consideration, we will or not, but I think we ought to reserve the right.

The Referee: Well, I think that you have had so much argument about it, I think that it might clear up the record a little if you would submit it.

Mr. Bollenback: Very well, we will put them in.

The Referee: That will be the next exhibit. 32 will be [120] the number of the photostatic copy furnished by Mr. Heider, and 33 will be the complaints in the Circuit Court.

Mr. Bollenback: We can put in all five of them if you want.

(Testimony of Otto W. Heider.)

The Referee: Do you have any objection?

Mr. Dougherty: No, your Honor.

The Referee: All right, you may combine them all.

Then we will adjourn this hearing with the agreement with counsel that later on we desire oral argument, or if Mr. Heider desires to introduce further testimony he may do so, only on that point on that note.

Mr. Heider: Yes, that Long note.

(Witness excused.)

(Hearing adjourned at 4:25 o'clock p.m.,
March 14, 1956.) [121]

Reporter's Certificate

I, Lunetta Bussey, hereby certify that on Wednesday, March 14, 1956, I reported in shorthand certain testimony and proceedings had in the above-entitled cause; that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 121 pages, numbered 1 to 121, both inclusive, constitutes a full, true, and accurate transcript of said testimony and proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 26th day of April, 1956.

/s/ LUNETTA BUSSEY,
Court Reporter.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of Order of General Reference in Judge's Absence; Order of Adjudication; Order Approving Trustee's Bond; Proof of Secured Debt of Otto W. Heider; Trustee's Objections to Proof of Debt of Otto W. Heider; Supplemental Objections to Claim of Otto W. Heider; Motion of Otto W. Heider to Dismiss Objections to Claim; Findings of Fact and Conclusions of Law; Order Denying Claim of Otto W. Heider; Petition for Review; Trustee's Summary of Evidence; Trustee's Memorandum of Authorities; Certificate of Referee on Petition for Review; Order Dated March 28, 1957, Affirming Referee; Notice of Appeal; Bond for Costs on Appeal; Order Extending Time for Filing Record on Appeal; Stipulation; Order Extending Time for Filing Record on Appeal; Designation of Contents of Record on Appeal; and Order to Transmit Exhibits, constitute the record on appeal from an order of said court in a certain bankruptcy cause therein numbered B-29990, In the Matter of Rand Truck Line, Inc., an Oregon corporation, bankrupt, in which Otto W. Heider, a creditor, is the appellant, and Samuel A. McAllister, Trustee in Bankruptcy, is the appellee; that said record has been prepared by me in accordance with

the designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that I am sending in addition to the said transcript of record, and under separate cover, two copies of reporters transcript of testimony dated July 6, 1949, and March 14, 1956, together with Trustee's Exhibits No. 1 to No. 19, inclusive, No. 21 to No. 29, inclusive, and No. 33; and Claimants Exhibits No. 20 and No. 30.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of July, 1957.

[Seal]

R. DEMOTT,
Clerk.

By /s/ E. W. DAVIS,
Deputy.

[Endorsed]: No. 15646. United States Court of Appeals for the Ninth Circuit. Otto W. Heider, Appellant, vs. Samuel A. McAllister, Trustee in Bankruptcy of the Estate of Rand Truck Line, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 23, 1957.

Docketed July 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,646

In the Matter of:

RAND TRUCK LINE, INC.,

Bankrupt,

OTTO W. HEIDER, a Creditor,

Appellant,

vs.

S. A. McALLISTER, Trustee in Bankruptcy,

Appellee.

STATEMENT OF POINTS ON
WHICH APPELLANT RELIES

The points on which appellant intends to rely in this appeal are as follows:

(1) The Bankruptcy Court was without jurisdiction to consider the objections of appellee to the claim of appellant.

(2) Even if the Bankruptcy Court had such jurisdiction, such objections should not have been considered because of undue laches on the part of appellee.

(3) That the order attacked is not, in fact or in law, supported by the findings.

(4) That the findings, material to the claim of appellant, are erroneous and without any support in the record.

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1957.

[Title of Court of Appeals and Cause.]

MOTION WITH RESPECT TO PRINTING
OF EXHIBITS AND ORDER

Now comes appellant and respectfully shows the Court that there are in this cause a substantial number of documentary exhibits (including accounting records) which would be very expensive to print or otherwise reproduce, and which may easily be considered in their original form; and

Moves the Court for an order permitting all of said documentary exhibits to be considered by the Court in their original form without the necessity of printing or otherwise reproducing the same.

/s/ WILLIAM E. DOUGHERTY,
Of Attorneys for Appellant.

So Ordered:

/s/ ALBERT L. STEPHENS,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed September 25, 1957.

United States
Court of Appeals
For the Ninth Circuit

OTTO W. HEIDER,
Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy
of the Estate of Rand Truck Lines, Inc.,
Appellee.

Brief of Appellant

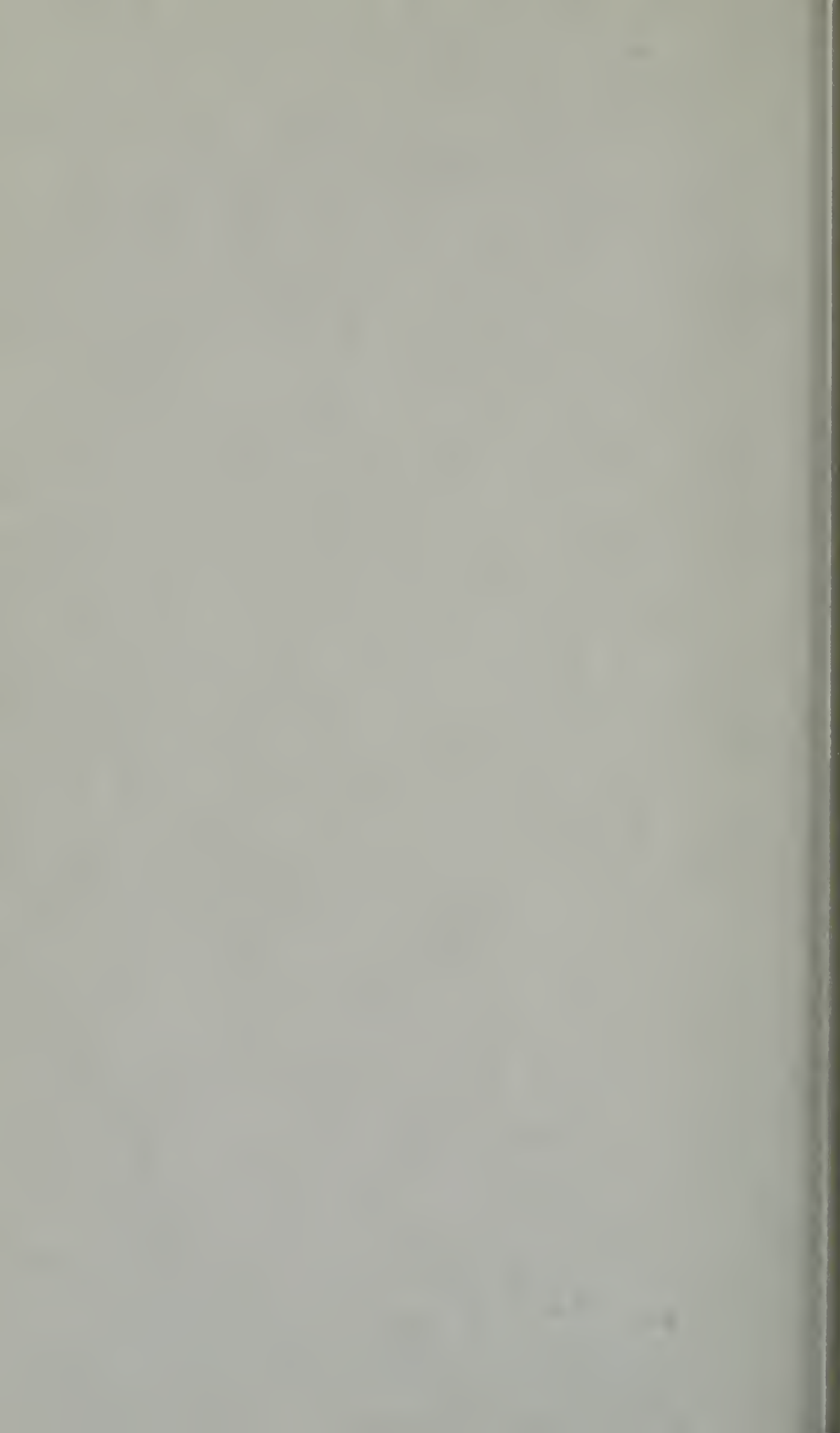
Appeal from the United States District Court
for the District of Oregon

WILLIAM E. DOUGHERTY,
JACK H. CAIRNS,
Public Service Building,
Portland, Oregon,
Attorneys for Appellant.

FILED

APR 12 1958

PAUL P. O'BRIEN, CLERK



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United States
Court of Appeals
For the Ninth Circuit

OTTO W. HEIDER,
Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy
of the Estate of Rand Truck Lines, Inc.,
Appellee.

Brief of Appellant

Appeal from the United States District Court
for the District of Oregon

JURISDICTION

Rand Truck Line, Inc., upon its voluntary petition, was adjudged a bankrupt on May 23, 1949 (R. 4). This appellant filed his proof of secured debt, with the counterparts of the original note, mortgage and assignment attached as an exhibit thereto, on June 30, 1949 (R. 5-19).

On September 19, 1949, the trustee invoked the jurisdiction of the state court by bringing a plenary

action against appellant and others (Ex. 33), and that suit is still pending.

Some years later, on January 31, 1956, the trustee filed in the bankruptcy court objections to appellant's 1949 proof of debt (R. 20-27), raising the same issues against appellant as involved in the state court proceeding (see Exhibit "A" to this brief). Supplemental objections were filed by the trustee on March 14, 1956 (R. 27-28).

Motion to dismiss the objections on the jurisdictional ground involving the state court proceeding was filed by appellant on March 14, 1956 (R. 29-30). The motion was denied as to the first objections (R. 155), but the supplementary objections were removed from consideration (R. 221). The Referee proceeded to hearing (R. 150 et seq.).

By order entered October 2, 1956 (R. 37) the Referee sustained the trustee's objections. A petition for review (R. 38-39) was filed by appellant on October 10, 1956.

The District Court by order filed March 28, 1957, affirmed the order of the Referee and denied the petition for review (R. 45-46).

This appeal is taken (R. 46) from the foregoing final order of the District Court, by virtue of Title 11 U.S.C.A., §47, and Title 28 U.S.C.A., §1291.

STATEMENT OF THE CASE

On Jurisdiction Issue

A hearing was held on the appellant's lien on July 6, 1949 (R. 51 et seq.). At that time the Referee ordered (R. 107-108) that the property be sold free from lien and that the Court would not at that time pass on the question of the amount owing or any questions that might be raised as to the validity of the mortgage. The Referee stated (R. 108):

“Those are questions that Mr. Heider will have ample opportunity to meet at the time, but it is hoped, Mr. Heider, that we can sell this truck line, the equipment, as a going concern in order to get some value out of the permits, and it would be to the advantage of all. We expect to sell it for considerably more than the amount you claim and the matter of determining the validity and amount of your lien will be taken up and if the Trustees have any objections to it you will be served with the objections and then there will be a further hearing on it. I am not determining that matter at all.”

In fact such objections were not filed until nearly seven years later (R. 20 et seq.), and there was no further hearing until March 14, 1956 (R. 150 et seq.). In the meantime, on September 19, 1949, the Trustee sued this appellant and others in the Circuit Court of the State of Oregon, for the County of Multnomah (Ex. 33, R. 264, R. 152). As stated in the Referee's certificate (R. 41-42):

“On the same day, September 1, 1949, the trustee promptly filed a petition alleging that certain stockholders of the bankrupt had converted corporate funds to their own use, and had applied them to the payment of personal obligations owing to Otto Heider. The trustee requested authority to institute an action in the State Court against the stockholders and Otto Heider for the recovery of said corporate funds. An order was entered on the same day authorizing action. Such an action was filed in the Circuit Court of the State of Oregon for the County of Multnomah on September 19, 1949.”

The history of the state court litigation is succinctly as follows (Ex. 33): The trustee's original complaint was filed on September 19, 1949. The trustee's amended complaint was filed on July 18, 1951. The trustee's second amended complaint was filed on September 4, 1952. The trustee's third amended complaint was filed on February 16, 1953. The trustee's fourth amended complaint was filed on July 3, 1953. The trustee's reply to the answer of this appellant was filed on December 5, 1955. Of course, there were also various other factual pleadings, motions and demurrers.

The issues on the merits in the state court proceeding as against appellant are identical with the issues here.

On Other Issues

In the State Court action the trustee's claims are based on allegations that the obligations to Mr. Heider were ultra vires for the bankrupt, were usurious, and constituted a diversion of assets in fraud of creditors. (See Exhibit "A" to this brief where the relevant parts of the trustee's pleadings in the state court action are set out.) The same allegations are relied upon in the trustee's objections to the proof of debt in this proceeding (R. 20-26). The same allegations appear in the Referee's findings here (R. 30-36).

We assert that the findings are not supported by the evidence, and that the effect given the findings involves several grave errors in law.

After having originally prepared a lengthy argument on those matters, however, we have now determined not to press those grounds of appeal. This is done, not because those grounds of appeal are without merit, but because it is our submission that this appeal can properly be disposed of on the jurisdictional issue. If that is true, then it is idle and burdensome to submit involved and intricate factual analyses and legal arguments on other issues.

SPECIFICATION OF ERROR

The lower court erred in deciding that, after the trustee had voluntarily and with authority submitted the issues to the state court, he is not bound by the

state court proceedings in the plenary action, but may submit the identical issues for summary determination by the Referee while the state court proceeding is still pending.

Argument

The sale of assets free from appellant's lien was ordered in 1949. The Referee then thought that, if the trustee had any question as to the validity of appellant's claim, the trustee would file objections. Instead the trustee decided upon, and the Referee consented to, the bringing of a plenary suit in the state court.

That suit is still pending and involves issues raised by the trustee of fraudulent transfer, ultra vires and usury. Of course, questions concerning what is ultra vires for an Oregon corporation, and concerning the application of the Oregon interest statutes, are particularly suitable for determination by an Oregon court; and a plenary action in a state court is the proper remedy for recovery of alleged fraudulent transfers.

The parties consented to the jurisdiction of the state court, appeared therein, and spent considerable time developing the issues on the pleadings. The issues are now before the state court ready for determination.

After the lapse of nearly seven years while proceedings were had in the state court, however, the

trustee in 1956 filed his objections in the bankruptcy court raising identically the same issues. Appellant did not consent to that procedure but filed a motion to dismiss based upon the state court proceeding.

The Referee denied the motion. His grounds for doing so appear from his comments (R. 155):

“* * * but this court is not accustomed to waiting 6, 7, and 10 years to get things determined. The purpose of the Bankruptcy Act is to liquidate the assets as quickly as possible and see that they are paid to the creditors according to the equities of the case and pro rata to the general creditors. I think Mr. Heider is just as anxious as the rest of us to try to get this matter determined once and for all.”

In other words, the Referee thought (1) the proceedings were taking too much time in the state court, and (2) it was desirable “to get this matter determined once and for all.”

Factually both of his conclusions are true, but neither one of them warrant his action: (1) Regardless of what opinion he may have of the state court, it is not for the bankruptcy court to supervise or review the proceedings of a state court. *Luikart v. Farmers' Lumber Co.*, 38 F.2d 588. (2) The Referee's action does not terminate the controversy. If it were sustained, it would simply permit the trustee to return to the state court and claim *res judicata*. Thus, by the Referee's summary and arbitrary de-

termination of the issues, including those involving strictly local law, the trustee would claim that this appellant as defendant would be deprived of a trial in the plenary action to which both parties consented.

Suit Was Properly Brought in the State Court

The Bankruptcy Act contemplates that the trustee may bring plenary suits in the state court, and consent of the bankruptcy court in a case such as this may not be required. 2 Collier on Bankruptcy (14th ed.) 47.05, pp. 1743-4. In fact, consent was given here. The giving of such consent was proper. *Ex parte Baldwin*, 291 U.S. 610, 619.

“The general principle that from the time of the filing of the petition in bankruptcy the estate is in custodia legis and within the exclusive jurisdiction of the bankruptcy court * * * is in no way inconsistent with the exercise of jurisdiction by a State Court in a case instituted therein, where the subject matter is within the jurisdiction of the State Court * * *.” *Herman v. Cullerton*, 13 F. 2d 754, 755.

In effect, the bankruptcy court exercises its “exclusive” jurisdiction, and the discretion devolving therefrom, by permitting the prosecution of the state court action. *Thompson v. Magnolia Co.*, 309 U.S. 478, 483. But, once the state court has jurisdiction, if it errs, “such error is reviewable only in the appellate court of the state.” 8 C.J.S. 928, Bankruptcy §261(b).

The Issues Are Identical

While the trustee's claims for relief may be somewhat different in his action in the state court and in his subsequent objections to the claim in the bankruptcy court, the issues are identical. As Exhibit "A" to this brief there are printed from Exhibit 33 the relevant parts of the trustee's Fourth Amended Complaint in the state court proceeding and of his Reply to this appellant's Answer thereto. In Exhibit "A" there are also cross-references to the trustee's objections to appellant's proof of claim (R. 20-26), and to the Referee's findings of fact (R. 30-36). The comparison proves the identity of issues.

In his objections the trustee in effect (and usually verbatim) copied his allegations from his pleadings in the state court proceeding. In his findings the Referee followed the trustee's state court allegations very closely except that he summarized some evidential allegations.

Clearly the Trustee Is Bound by the State Court Proceedings

It is no longer subject to question but that, where the trustee has voluntarily and with authority invoked the jurisdiction of the state court and submitted the issues to it for determination, he cannot question the right of the state court to determine the controversy, and cannot obtain another determination in the bankruptcy court. *Herman v. Cul-*

lerton, supra, 13 F. 2d at 756; *In re American Fidelity Corp.*, 28 F. Supp. 462; *Van Zandt v. Parson*, 81 Or. 453, 456, 159 Pac. 1153.

Thus, in *Grant v. Buckner*, 172 U.S. 232, 238, the Court held: "The [Federal] receiver voluntarily went into the state court, and having voluntarily gone there cannot question the right of that court to determine the controversy between himself and the defendant." Again, in *Winchester v. Heiskell*, 119 U.S. 450, 453, the Court held, despite what is now 28 U.S.C.A. §1334: "The assignee in bankruptcy appeared in the State court and litigated his rights there. This he had authority to do, and the judgment in such action is binding on him. This we have many times decided."

See also *Fischer v. Pauline Oil Co.*, 309 U.S. 294, 303; 1 Collier on Bankruptcy (14th ed.) 2.07, p. 158.

The Principle Is Still Applicable Where the State Court Has Not Yet Rendered Judgment

The mere fact that the state court litigation has not yet been concluded with a judgment on the merits does not vary the principle. The reasons are succinctly stated *In re Graceland*, 73 F. Supp. 158, 160, as follows:

"The issue of the claims to the title to the alleged asset was to be determined in the State Court. That was the clear, expressed intention of the Referee and it was the understanding of the parties. Once that course was determined upon

the Bankruptcy Court should take no action to affect the possession of the property, or make orders which would render ineffective the orders and judgments of the State Court to which it had not only conferred jurisdiction but in which court it had directed the parties to try the title of the property. Thereafter the possession, control and final disposition of the property are solely within the jurisdiction of the said State Court. Of course it follows that should the trustee return to the Bankruptcy Court a successful litigant, then the care, sale and disposition of the asset would be under the exclusive control of the Bankruptcy Court."

In *Scott v. Kelly*, 22 Wall. (89 U.S.) 57, 59, the assignee in bankruptcy voluntarily submitted to the jurisdiction of the state court and presented his claim for adjudication by that court. The Court held: "It is now too late to object to the power of the State court to act in the premises and render judgment."

CONCLUSION

It is submitted that the action taken below in effect deprives the state court of its power to act in the premises and to proceed to render its own judgment. Once the trustee has properly invoked the jurisdiction of the state court and submitted the issues to it in a plenary action, the bankruptcy court ought not to interfere by a purported determination of the issues in summary proceedings. Even if the

state court should err, the bankruptcy court has no supervisory, corrective or appellate power. The final judgment of the state court on the issues litigated should be controlling. Of course, should the trustee return from the state court a successful litigant, then the bankruptcy court would have exclusive jurisdiction over the disposition of the proceeds. If the trustee returns with an adverse decision, the bankruptcy court ought not be able to reach a contrary decision on the issues litigated.

It is submitted that the decision below should be reversed.

Respectfully submitted,

WILLIAM E. DOUGHERTY,

JACK H. CAIRNS,

Attorneys for Appellant.

Portland, Oregon
April 1958

EXHIBIT "A"

Text of the relevant parts of the Trustee's Fourth Amended Complaint, and of his Reply to claimant's Answer thereto, in the proceeding in the Circuit Court of the State of Oregon, for the County of Multnomah, entitled

No. 190-145

Samuel A. McAllister, Trustee in Bankruptcy
for Rand Truck Line, Inc., a bankrupt,
Plaintiff,

vs.

Vern Markee, Florence Markee, his wife,
Loren Markee, Harold Macy, Beryl B. Taylor
and Otto Heider,

Defendants.

These documents are included in Exhibit 33.

TRUSTEE'S FOURTH AMENDED COMPLAINT

Comes now the plaintiff and for his fourth amended complaint, alleges:

I.

(Omitted as containing formal allegations.)

II.

That on or about the 28th day of September, 1944, and at a time when the assets of said corporation did not exceed its liabilities and at a time when said corporation was operating at a net loss, the defendants Vern Markee, Florence Markee and

Loren Markee purchased 4000 shares of the capital stock of the Rand Truck Line, Inc., from Robert R. Rand and Mrs. R. R. Rand, also known as Golda I. Rand; that said purchase was made by such defendants in their individual capacities and such shares of stock, except for transfer of portions thereof thereafter made to the defendants Harold Macy and Beryl B. Taylor, defendants herein, were owned by them at all times hereinafter, mentioned; that the defendant Otto Heider loaned and advanced to the said defendants, Vern Markee, Loren Markee and Florence Markee, and paid to the said Robert R. Rand and Mrs. R. R. Rand, also known as Golda I. Rand for and on their behalf to aid and assist them to purchase said stock the sum of \$31,500.00; that the said defendants Vern Markee, Florence Markee, Loren Markee attempted to bind and obligate the said Rand Truck Line, Inc., a corporation, to the payment of such personal obligations, namely, payment to Otto Heider of the monies advanced by the said Otto Heider to the said Vern Markee, Florence Markee and Loren Markee individually for the purchase of said capital stock by causing the said Rand Truck Line, Inc., acting through the said Vern Markee, Florence Markee and Loren Markee, to execute a purported note and mortgage in the face amount of \$43,560.00 including interest, in favor of Mrs. R. R. Rand, also known as Golda I. Rand, which said note and mortgage was immediately and

as a part of the same transaction delivered to the said Otto Heider.

(Compare objections, R. 20-21, and findings, R. 30-31.)

III.

(Omitted as relating to other defendants.)

IV.

That between September 28, 1944, and until August 7, 1946, the defendants, Vern Markee, Florence Markee and Loren Markee and Harold Macy diverted and caused to be diverted to their own use and benefit and paid and caused to be paid to the defendant Otto Heider upon said purported note and mortgage large sums of money belonging to and owned by said Rand Truck Line, Inc., namely approximately \$1000.00 per month during said period; that on and at a time when there remained a purported balance of \$13,168.00 upon said alleged note and mortgage a second and subsequent purported note and mortgage was executed by said defendants, purporting to bind the said Rand Truck Line, Inc., to pay said balance in addition to other moneys then advanced by the said Otto Heider on behalf of the said Rand Truck Line, Inc.; that thereafter the defendants herein, except the defendant Otto Heider continued to divert and cause to be diverted and paid to the defendant Otto Heider upon said purported second note and mortgage additional

large sums of money belonging to and by said Rand Truck Line, Inc., namely: approximately \$1000.00 per month until the month of May, 1949; that as a result of such payment so made by the defendants herein and so received by the defendant Otto Heider, more than \$40,000.00 of monies owned by the said bankrupt corporation, Rand Truck Line, Inc., were diverted from said corporation and the creditors of said corporation and applied upon the aforesaid individual debts and obligations of the defendants, except the defendant Otto Heider; that the defendant Otto Heider with full knowledge that such sums of money belonged to and were assets of said bankrupt corporation, the Rand Truck Line, Inc, received and accepted the same and attempted to apply the same in payment of said personal obligations of the other defendants herein. That no part of said sums have been repaid to the said Rand Truck Line, Inc., or the plaintiff herein.

(Compare objections, R. 21-22, and findings, R. 31-32.)

V.

(Omitted as applying to other defendants.)

VI.

That during said period of time, namely between Sept. 28, 1944 and May 20, 1949, the said Rand Truck Line, Inc., did not earn any profits, in excess of operating costs, and did not have nor acquire any

surplus funds; that the unpaid debts and liabilities of the said Rand Truck Line, Inc., increased and continued to increase during said period; that the monies paid out and received as hereinabove alleged, were not paid out of net profits or surplus; that the execution of said purported notes and mortgages and payment of the moneys paid out and received as aforesaid rendered and caused said Rand Truck Line, Inc., to become and be insolvent and bankrupt, and unable to pay its debts in the ordinary course of business, and with liabilities exceeding in amount the value of its assets, taken at a fair valuation and exclusive of such monies so paid and received as hereinabove alleged. That the time of its adjudication in bankruptcy the said Rand Truck Line, Inc., was indebted to various firms and persons and corporations in a total approximate amount of \$40,000.00. That the execution of said purported notes and mortgages and the payments of money paid out and received as hereinabove alleged, hindered, delayed and defrauded creditors of the said Rand Truck Line, Inc., and were intended to and did deprive said creditors of the assets of said corporation and were intended to and did attempt to discharge the aforesaid personal obligations of the other defendants herein, to Otto Heider, to the detriment and damage of such creditors of said corporation.

(Compare objections, R. 22-23, and findings, R. 33-34, 35.)

VII.

That the said Rand Truck Line, Inc., received nothing of value nor any consideration whatsoever, in return for the execution of said first note and mortgage or payment of such personal obligations of the defendants; that the Articles of Incorporation of the said Rand Truck Line, Inc., gives or grants to said corporation no power to pledge its credit or borrow money for or on behalf of its stockholders, directors or any other persons whatsoever or to purchase its own stock for and on behalf of itself or any other person; that the purported execution of the said alleged notes and mortgages, and the payment of said sums as hereinabove alleged to the said Otto Heider, was and is beyond the power and authority of said corporation, its officers or directors.

(Compare objections, R. 24, and findings, R. 32-33.)

VIII.

That the plaintiff herein, the said Samuel A. McAllister is the duly appointed, qualified and acting trustee in bankruptcy for the Rand Truck Line, Inc., an Oregon corporation; that the said Rand Truck Line, Inc., was regularly and duly adjudicated a bankrupt by the District Court of the United States for the District of Oregon on or about May 20, 1949; that as of said date of adjudication in bankruptcy, said corporation was indebted and

owed sums of money to various persons, firms and corporations which said debts and claims existed prior to and antedated the acts, transactions and occurrences hereinabove set out and alleged. That said debts and claims were and are provable claims in bankruptcy, were and are included in the schedules of the said Rand Truck Line, Inc., as obligations owed by said bankrupt and the creditors to whom such debts and claims were and are owed by the said Rand Truck Line, Inc., have heretofore filed claims therefor in such bankruptcy proceedings; that the plaintiff herein has been authorized and empowered by the said District Court of the United States for the District of Oregon to institute this suit; that the plaintiff herein brings this action in his representative capacity as such trustee in bankruptcy for and on behalf of said corporation and for and on behalf of the creditors thereof having claims provable in bankruptcy.

IX.

That the plaintiff has no plain, complete or adequate remedy at law.

WHEREFORE, Plaintiff prays for a decree of this Court as follows:

1. That the defendants Vern Markee, Florence Markee, Loren Markee, Harold Macy, Beryl B. Taylor and Otto Heider, and each of them, be required to appear herein and account for the moneys

and property owned by Rand Truck Line, Inc., paid by the other defendants herein named and received by the defendant Otto Heider, upon personal obligations of said defendants, and that if the defendants or any of them fail to so appear, that the plaintiff have judgment against the defendants, and each of them, in the sum of \$40,000.00; and

2. That upon such accounting, a judgment be entered in favor of the plaintiff and against the defendants, and each of them, for such sums of money as are found to be due to the plaintiff from the defendants and each of them; and

3. That upon such accounting, a trust be impressed upon the above described real property, in favor of the plaintiff herein, for such sums of money as are found to have been used in the improvement thereof, in violation and derogation of the rights of the Rand Truck Line, Inc., and of the plaintiff herein, and

4. Such other and further Orders, Decrees and Judgments as to this Court seem just and equitable in the premises.

TRUSTEE'S REPLY TO ANSWER OF OTTO HEIDER

Comes now the plaintiff and, for his reply to the answer and counterclaim of the defendant Otto Heider herein, admits, denies and alleges as follows:

As a matter in abatement, plaintiff alleges:

(Plea in abatement omitted.)

And for his first answer to the merits of said counterclaim of the defendant Otto Heider, plaintiff admits, denies and alleges:

(General denial omitted.)

And for his second answer to the merits of said first, further and separate answer and affirmative defense, the plaintiff alleges:

I.

That on or about the 28th day of September, 1944, the defendant Otto Heider advanced for the use and benefit of the other defendants herein the sum of \$36,500.00, and the defendants attempted to bind the Rand Truck Line, Inc., to repay the sum of \$43,560.00 in payment therefor and caused said Rand Truck Line, Inc., to execute a note and mortgage purportedly agreeing to repay said sum of \$43,560.00; that included in the amount of said purported note and mortgage in addition to the alleged principal sum was the sum of \$7,060.00 as prepaid interest; that said prepaid interest was computed and included at a rate and in amounts in excess of 10% per annum, namely, at a rate of approximately 10.40% per annum.

(Compare objections, R. 24-25, and generally findings, R. 35-36.)

II.

That subsequently thereto and after payments had been made by said Rand Truck Line, Inc., in the

amount of \$30,392.00 upon said purported note and mortgage, with a claimed balance due thereon of \$13,168.00, or \$6,108.00 excluding said item of purported prepaid interest, in consideration of claimed advances of \$22,529.00 to the Rand Truck Line, Inc., the defendants herein caused the said Rand Truck Line, Inc., to execute a purported note and mortgage in the amount of \$43,560.00, which note and mortgage purported to include the alleged balance upon said first note and mortgage of \$13,168.00, such claimed advances of \$22,529.00 and prepaid interest in the amount of \$7,533.00. That said prepaid interest was computed and included at a rate and in amounts in excess of 10% per annum, namely, at a rate of approximately 11.275% per annum if the prepaid interest item of said first purported note and mortgage is included in the alleged principal amount or approximately 28.1% if the prepaid interest item of said first purported note and mortgage is excluded therefrom.

(Compare objections, R.25, and generally findings, R.35-36.)

III.

That the purported agreements of the Rand Truck Line, Inc., to pay said sums representing prepaid interest were demanded and received by the defendant Otto Heider, and acquiesced to by the other defendants as the purported consideration for the alleged extension of time evidenced by said pur-

ported notes and mortgages for the payment of said alleged debts and were included and added to the balances claimed to be due from the Rand Truck Line, Inc., to the defendant Otto Heider knowingly and with the intent on the part of the defendants to collect and receive and to have the said Rand Truck Line, Inc., pay interest on such claimed indebtednesses at a rate in excess of 10% per annum.

(Compare objections, R-25-26, and generally findings, R-35-36.)

IV.

That the defendant Otto Heider received and accepted said purported notes and mortgages with full knowledge of the facts herein alleged.

(Compare objections, R. 26, and findings, R. 35-36.)

V.

That funds of the Rand Truck Line, Inc., in excess of \$59,029.00 were paid to the defendant Otto Heider, as alleged in plaintiff's complaint, and any purported balance claimed to be due to the said Otto Heider on said purported notes and mortgages were and are balances representing usurious interest charges computed at a rate in excess of 10% per annum, as hereinabove set out.

(Compare objections, R. 26, and generally findings, R. 35-36.)

WHEREFORE, having fully replied to the answer and counterclaim of the defendant Otto Heider, plaintiff prays that the defendant Otto Heider take nothing by reason thereof, and that plaintiff have the decree of this Court in accordance with the prayer of his fourth amended complaint.

EXHIBIT "B"

In the following table are shown in adjoining columns page references to the record where the exhibits were identified, offered, received, or rejected as evidence:

EXHIBIT

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4	Mortgage dated July 11, 1946, and accompanying papers	78-187
5	Letter dated November 28, 1947	84
6	Mortgage to Mrs. R. R. Rand dated September 28, 1944	92
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11	Copy of Bill of Sale	110
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15	Certified copy of Articles of Incorporation	174, 176
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United States
COURT OF APPEALS
for the Ninth Circuit

OTTO W. HEIDER,

Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy
of the Estate of Rand Truck Lines, Inc.,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

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PAUL P. O'BRIEN, CLERK



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Remington on Bankruptcy (5th ed.), Vol. 4, Sec. 1426, p. 136	10
Remington on Bankruptcy (5th ed.), Vol. 5, Sec. 2369, p. 569	17

United States
COURT OF APPEALS
for the Ninth Circuit

OTTO W. HEIDER,

Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy
of the Estate of Rand Truck Lines, Inc.,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee believes that a more complete and accurate statement of the case, than contained in the appellant's brief, would be of material assistance to the court in determining the question of jurisdiction, the only question urged by the appellant.

An order to show cause was issued by the referee before whom the matter was pending, the Honorable Estes Snedecor, requiring the appellant to appear on July 6, 1949, and show cause why certain property of the bankrupt in the possession of the trustee claimed to be subject to a mortgage in appellant's favor, should

not be sold free from liens with the proceeds impressed with such liens as the court should determine to be valid (Referee's Certificate R. 41).

In response to this order the appellant filed his proof of secured claim, with the mortgage and notes attached thereto in the bankruptcy court June 30, 1949 (R. 5-19).

A hearing was had on July 6, 1949, as the result of which an order was entered by the referee, with the consent of the appellant (R. 105-106), authorizing the sale of the tangible assets free from the claim of any mortgage held by appellant and "providing that the proceeds of the sale be impressed with the lien of such mortgage or claimed mortgage, the court expressly reserving the right and power to determine the validity or amount due upon such mortgage" (Referee's Certificate R. 41).

Thereafter such assets were sold and the proceeds collected. The order authorizing the sale provided that the proceeds of the sale should be impressed with the liens found upon the personal property so sold "with this court reserving the power to determine the validity and amount of all such liens" (Referee's Certificate R. 41).

On the same day as the entry of this order, an order was entered authorizing a suit by the trustee, in the state courts, against officers and directors of the bankrupt corporation and Otto W. Heider, appellant herein, for the recovery of certain corporate funds used by such officers and directors and delivered to the appellant in

an attempt to pay personal obligations owing by them to him (R. 41-42).

Such suit was commenced in the Circuit Court of the State of Oregon for the County of Multnomah.

In response to the trustee's Fourth Amended Complaint in this suit the appellant included in his answer a counterclaim seeking to foreclose the identical note and mortgage that is the basis of his claim filed in the bankruptcy court (Ex. 33).

As to the trustee, after alleging his appointment, the appellant alleged:

"The plaintiff herein (trustee) holds funds in his possession belonging to the defendant, Otto W. Heider, which have not been, and should be, applied in payment and in satisfaction of the balance due upon said note and mortgage above described; and the property therein set forth is held as security therefor, and said mortgage is a first and prior and unsatisfied lien against said personal and real property and is unsatisfied."

The prayer asked for a decree determining said mortgage to be a valid and subsisting and prior obligation against the property involved and that the funds in the hands of the plaintiff (trustee) should first be applied in satisfaction thereof and that appellant be allowed attorney fees.

The trustee, in his reply to this counterclaim, pleaded in abatement thereto, that at the time of adjudication in bankruptcy of bankrupt, certain property was owned by it and in its possession; that the trustee took possession of the same and sold it free from liens pursuant to orders of the bankruptcy court; that the trustee had

certain funds in his possession received from the sale of such property as well as other funds; that the appellant had filed a claim in the bankruptcy proceedings for the claimed balance due upon the note and mortgage which claim had not been acted upon but was still pending; that by reason of such bankruptcy proceedings, the exclusive jurisdiction of the United States District Court for the District of Oregon over the funds in the trustee's possession, and the claim of appellant filed in such proceedings, the counterclaim of appellant should be abated and appellant relegated to his rights in the bankruptcy proceedings (Ex. 33), and in his reply to the merits of the alleged counterclaim, the trustee pleaded the defense of usury.

Under Oregon procedure, this reply to the merits of the counterclaim was joined with the plea in abatement. The action in the State court is still pending and the plea in abatement has not been determined.

Thereafter, objections were filed to appellant's claim in the bankruptcy proceedings.

A motion to dismiss such objections was made "on the ground that the bankruptcy court is without jurisdiction to entertain these objections because the same matter has been submitted to the Circuit Court of the State of Oregon for the County of Multnomah. . . ." (R. 29).

This motion was denied. The referee said (R. 155):

"The only matter before this court is the validity of his claim and the mortgage securing his alleged claim. I don't think this court can relinquish paramount jurisdiction to determine that matter."

As stated in the referee's certificate (R. 42) he ruled that

"The action in the state court is for the recovery of corporate funds and only indirectly involves the question of the validity of the Heider mortgage."

Upon the hearing, appellant's claim was denied. On appeal to the District Court for Oregon, the referee's decision was affirmed. The appellant then brought his appeal to this court.

ON OTHER ISSUES

We have confined the statement of the case to the jurisdictional question since the appellant is not urging the other specifications of error.

STATUTES INVOLVED

The provisions of the Bankruptcy Act involved in this case are (Title 11, Ch. 2, Sec. 11 USCA):

"Creation of courts of bankruptcy and their jurisdiction:

"(a) The Courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . to—

* * *

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims and allow or disallow them against bankrupt estates;

* * *

“(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, . . . ”

ANSWER TO SPECIFICATION OF ERROR

The lower court was correct in denying appellant's motion to dismiss on jurisdictional grounds.

SUMMARY OF ARGUMENT

The suit was properly brought in the state courts but that suit was and is separate and distinct from the claim filed by the appellant in the bankruptcy court and the objections filed thereto.

The fact that the trustee will be bound by the decision in the state courts, as to the cause of action being pressed by him in that court, does not have any effect upon the litigation in the bankruptcy court with reference to the claim filed by the appellant.

Authority to commence the state court litigation was not an abdication by the bankruptcy court of its powers and jurisdiction to administer the estate of the bankrupt, and to pass on claims filed in said estate, and the validity of liens upon funds in its possession. Consent of bankruptcy court to action against trustee in state courts can be revoked prior to adjudication.

Allowance and disallowance of claims filed therein, is within the exclusive jurisdiction of the bankruptcy court.

Determination of the validity of liens claimed to exist against property in its possession is within the exclusive jurisdiction of the bankruptcy court.

In this case, the bankruptcy court, by its orders, expressly reserved to itself, the power and right to determine the validity of appellant's lien.

Appellant submitted to the jurisdiction of the bankruptcy court, filed his claim therein, and consented to the sale of the personal property free from the lien of his alleged mortgage. Appellant is bound by the orders of the bankruptcy court reserving the right and power to determine the validity of liens claimed against the property in its possession and cannot oust that jurisdiction by asserting the same claim in the state court proceedings.

ARGUMENT

In the opening portion of his argument, appellant makes numerous statements not in accord with the facts and record. The referee never authorized nor consented to the litigation, in the state courts, of the merits of appellant's claim; the trustee objected to its assertion in that court on the ground that the bankruptcy court had exclusive jurisdiction thereof (Ex. 33) and the referee, in denying the motion to dismiss the objections to appellant's proof of claim did so on the ground that the bankruptcy court had exclusive jurisdiction to pass upon the same (R. 155). The court will recognize other discrepancies.

Luikart v. Farmers Lumber Co., 38 F.2d 588, cited to the effect that a federal court has no power to supervise a state court, is not in point. In that case, an action was commenced in the federal courts to annul and vacate a judgment of the courts of the State of Wyoming. The court refused the relief asked.

Answer to Contention That Suit Is Properly Brought in the State Court

The trustee has no quarrel with the proposition that the suit was properly brought in the state courts and that as to the cause of action set out in his complaint filed therein the state court's adjudication will be final. But that is not the question involved here.

The question for decision is whether the appellant can nullify the proceedings in the bankruptcy court, oust the bankruptcy court of its jurisdiction to pass upon claims filed with it, and of its jurisdiction to determine the validity of liens claimed to exist upon property in its possession, by asserting a counterclaim in the state court litigation.

The authorities cited by appellant recognize the paramount jurisdiction of the bankruptcy court under such circumstances.

The extraordinary relief of mandamus was denied the trustees in *Ex Parte Baldwin*, 291 U.S. 610 (App. Br. 8), but it was pointed out that the trustees could have applied to the bankruptcy court for injunctive relief to restrain action in the state courts. The court said (p. 616):

"The inherent power of the bankruptcy court to protect its jurisdiction, over property of which it has taken possession, from interference by suit thereafter begun in a state court has not been abridged. . . ."

Herman v. Cullerton, 13 F.2d 754, 755, quoted by appellant (App. Br. 8) involved a fund paid into the state court, where the trustee appeared and defended. It was held the trustee was bound by the state court judgment, but the court indicated that the result would have been otherwise had the fund been in the possession of the bankruptcy court.

Thompson v. Magnolia Co., 309 U.S. 478 (App. Br. 8), involved oil rights upon railroad right of ways. The court said at p. 483:

"A court of bankruptcy has an *exclusive and non-delegable* control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration."

In the instant case, not only was there no consent by the bankruptcy court to litigation in the state courts of the merits of the appellant's claim to a note and mortgage upon the assets of the bankrupt corporation, but the approval or disapproval of claims is within the "exclusive and non-delegable" jurisdiction of the bankruptcy court.

Answer to Contention That the Issues Are Identical

The issues in the complaint filed by the trustee in the state court were, basically, the transfer of property of the bankrupt in fraud of creditors and conversion thereof by the officers and directors of the bankrupt, and the appellant, Otto W. Heider.

When the alleged counterclaim was asserted, the trustee coupled his plea in abatement raising the question of jurisdiction with an answer to the merits of the alleged counterclaim.

Such procedure is proper under Oregon practice and does not waive the jurisdictional question.

Credit Service Co. v. Korn, 121 Or. 685, 256 Pac. 1047.

This answer to the merits, raised the issue of usury as a defense. This is an issue that was not part of the trustee's cause of action as stated in his complaint.

"The defense of usury must be distinguished from the right of action to recover a penalty for usury. Although the defense of usury is personal to a debtor, the right to assert this defense passes to the trustee." *Remington on Bankruptcy*, 5th Ed., Vol. 4, Sec. 1426, p. 136.

Since this defense exists, it was only proper to assert it in the reply to the merits to the alleged counterclaim as well as the objections to appellant's claim.

The referee held that the validity of the Heider mortgage was only indirectly involved in the suit in the state court (Referee's Certificate R. 42). This is true, because had the same transactions occurred, as alleged

in that complaint, without existence of the claimed security asserted by the appellant, or any claimed balance due appellant the trustee's rights to recover the moneys would have been the same.

It probably is proper to say that some of the facts involved in the state court litigation are the same as the facts involved in the appellant's claim filed in the bankruptcy court and objections thereto but the legal issues are different.

Answer to Contention That Trustee Is Bound by the State Court Proceedings

The trustee admits that as to the cause of action set out in his complaint, in the state court proceedings, he will be bound by the result thereof in the state court.

As to the appellant's authorities, *Herman v. Cullerton*, 13 F.2d 754 (App. Br. 9-10), was distinguished *supra*.

In re American Fidelity Corp., 28 F. Supp. 462 (App. Br. 10), involved a litigation commenced prior to bankruptcy over a fund and the court pointed out that it was questionable whether the bankruptcy court had either actual or constructive possession thereof. The trustee, with the bankruptcy court's permission intervened, and the judgment of the state court was binding upon him. The court recognized that there was certain functions of the bankruptcy court which are non-delegable (p. 468):

"Nor does it question that there are certain administrative functions which by their very nature are not capable of delegation."

In *Van Zandt v. Parson*, 81 Or. 453, 456, 159 Pac.

1153 (App. Br. 10), the same general rule is applied. When a trustee sues in a state court, he is bound by the adjudication; the question of the right of the bankruptcy court to pass on claims filed with it or determine liens upon funds in its possession were not involved.

In *Grant v. Buckner*, 172 U.S. 232, 238 (App. Br. 10), the court pointed out:

"The question presented is not how the estate belonging to the receiver shall be administered, but what is the estate belonging to him."

Applying this test to the present case, the complaint filed by the trustee in the state court involves "what is the estate" belonging to the trustee, while the counterclaim attempted to be asserted attempts to deprive the bankruptcy court of jurisdiction to determine "how the estate . . . shall be administered."

Winchester v. Heiskell, 119 U.S. 450, and *Fischer v. Pauline Oil Co.*, 309 U.S. 294, 303 (App. Br. 10), both apply the rule of the previous cases cited; as stated in *Brown v. Gerdes*, 321 U.S. 178, at pp. 185, 186:

"A bankruptcy trustee who by choice or by necessity resorts to a state court for the prosecution of a claim is of course bound by the adjudication made in the state proceeding. *Winchester v. Heiskell*, 119 US 450; *Fischer v. Pauline Oil & Gas Co.*, 309 US 294, 303. The state court has full control over the litigation. *But even as an incident thereto, it may not take action which involves the performance of functions which Congress has entrusted to the bankruptcy court.* See *Eau Claire National Bank v. Jackman*, 204 U.S. 522, 537-538."

and in the quoted case, *Eau Claire National Bank v. Jackman*, *supra*, the court said:

“The bank also contends, in effect, that in such suit (to recover a preference) the validity of all other claims against the bankrupt can be litigated and whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt’s estate from the United States District Court to the state court.”

**Answer to the Contention That the Principle
Is Still Applicable Where the State Court
Has Not Yet Rendered Judgment**

This contention is not correct. The cases cited do not support it.

In re Graceland, 73 F. Supp. 158, 161 (App. Br. 10), was a case where the trustee was expressly directed to try the title to property in the state courts and he instituted action for that purpose. Another action was commenced for the same purpose by others and the trustee intervened as a party defendant. The question was whether prosecution of the second action should be enjoined. The court said:

“Since the trustee was directed to try title in the state court, he cannot object that this result may be attained by means of the . . . cross complaint . . . rather than in his own action . . .”

These being the facts, this case is of no help in the matter before this court.

Scott v. Kelly, 22 Wall. (89 U.S.) 57, 59 (App. Br. 11), did not involve a pending action, but is another example of the proposition running through all the authorities cited by the appellant—that when a trustee in bank-

ruptcy secures authority to and does submit to the jurisdiction of a state court for the adjudication of a specific issue, that adjudication is binding upon the trustee and the matter cannot be re-litigated in the bankruptcy court.

Until there has been an adjudication, leave to sue can be withdrawn.

In *Investment Registry Ltd. v. C & M Elec. Ry. Co.* (CCA Wisc.), 251 Fed. 510, an Order had been entered authorizing suit against a receiver in the state court. Thereafter a motion to vacate that Order was filed. The court said, at page 512:

"If at any stage of the proceedings the court deems it proper and advisable that any demand or question be litigated elsewhere than in the federal court, it can authorize such litigation to be elsewhere instituted. But neither on principle nor authority does it follow that the court granting the leave to sue may not recall it, if before adjudication in such other tribunal the court granting the leave shall consider, either because of facts subsequently arising, or of new light coming to it as to then existing conditions, it would best subserve the due administration of the estate to recall the granted leave,"

and at page 513:

"If it appeared that any issue in the litigation had been determined by the state court in which the action was brought, pursuant to the leave granted, a different question might be presented."

And in *In re Locust Building Co.*, 272 Fed. 988, aff'd 276 Fed. 1023 (CCANY), a third mortgagee had obtained from the bankruptcy court leave to foreclose his mortgage in the state courts; the trustee had been directed by Order to sell the property covered by the

mortgage and to pay the mortgages (so far as held valid) out of the proceeds.

Thereafter, upon motion, the court stayed the foreclosure proceedings. The court said (272 Fed. at 989):

“If the state court did not deem it advisable or was unable to proceed with the liquidation of this claim and the determination of its validity within a reasonable time, the trustee could nevertheless in due course proceed before the referee or this court to determine how the fund should be distributed. . . .”

It is the trustee's position that the bankruptcy court reserved to itself the right to determine the validity of appellant's lien but if any consent to assert this lien in the state court be implied from the granting of the authority to bring the state court action, such consent was revoked or cancelled by the denial of the motion to dismiss on jurisdictional grounds.

The Bankruptcy Court Has Exclusive Jurisdiction to Pass on Claims Filed With It

The question for decision in this case is—does a trustee by going into the state court for the recovery of assets belonging to the bankrupt estate, thereby subject the assets of that estate to the jurisdiction of the state court so that the state court can pass on claims, determine the validity of liens upon funds in the custody of the bankruptcy court and thereby oust the jurisdiction of the bankruptcy court from the administration of the estate and the assets in its possession. The answer is clearly no—the state court's jurisdiction is limited to the controversy submitted to it and it cannot infringe

upon the other functions of the administration of the estate which are within the exclusive jurisdiction of the bankruptcy court.

The bankruptcy court has exclusive and non-delegable jurisdiction to pass on claims filed with it.

The United States Supreme Court in *Pepper v. Litton*, 308 U.S. 295, 304, said:

"Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217."

In the cited case of *United States Fidelity & Guaranty Co. v. Bray*, supra, the United States Supreme Court, after citing Sections 2, 23(a) and 57(k), states the following:

"We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

The court in the last cited case further stated the following (p. 218):

“Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal.”

Remington on Bankruptcy, 5th Ed., Vol. 5, Sec. 2369, p. 569:

“In general, neither a State Court, nor the United States District Court, has jurisdiction, even by express permission of the bankruptcy court, to maintain an action the object of which is to determine the validity or extent of a claim against a bankrupt estate that is in process of administration in the Bankruptcy Court, or to determine priorities in the distribution of the assets of a bankrupt estate in such custody; for the jurisdiction of the Bankruptcy Court over the administration of the bankrupt estate is original and exclusive; and the Bankruptcy Court has no authority to delegate that jurisdiction to another court.”

To the same effect, see Collier on Bankruptcy, 14th Ed., Vol. 3, Par. 57.14, p. 185.

**The Property Being in the Custody of the
Bankruptcy Court, Its Jurisdiction to
Determine the Validity of Liens
on the Property Is Exclusive**

In *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, the court said at pp. 737-738:

“Upon adjudication, title to the bankrupt’s property vests in the trustee with actual or constructive possession, and is placed in the custody of the bank-

ruptcy court. *Mueller v. Nugent*, 184 US 1, 14. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits (citing cases). It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. . . . When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb*, 178 US 542; *Murphy v. Hofman Co.*, 211 US 562; *Dayton v. Stanard*, 241 US 588. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy v. Hofman Co.*, supra; *Wabash R. Co. v. Adelbert College*, 208 US 38; *Harkin v. Brundage*, 276 US 36. Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. *Ex parte City Bank of New Orleans*, 3 How 292; *Houston v. City Bank of New Orleans*, 6 How 486; *Ray v. Norseworthy*, 23 Wall 128; *In re Wilka*, supra; *Nisbet v. Federal Title & T. Co.*, 229 Fed 644. The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. . . ."

(P. 739):

" . . . The jurisdiction in bankruptcy is made exclusive in the interest of the administration of the

estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of the property which has come into its possession. *Whitney v. Wenman*, 198 US 539; *In re Schermerhorn*, 145 Fed. 341. Indeed a court of bankruptcy itself is powerless to surrender its control of the administration of the estate. *U. S. Fidelity & G. Co. v. Bray*, 225 US 205. The action of the trustee in removing the cause, could not, therefore, divest the Texas District Court of its jurisdiction. . . ."

See also *Irving Trust Co. v. Fleming* (CCA 4th Cir.), 73 F.2d 423 at 427.

Having Filed His Claim Appellant Is Subject to Jurisdiction of Bankruptcy Court

In *Gardner, Trustee, v. New Jersey*, 329 U.S. 565, the court said:

"It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell*, 93 US 347, 351."

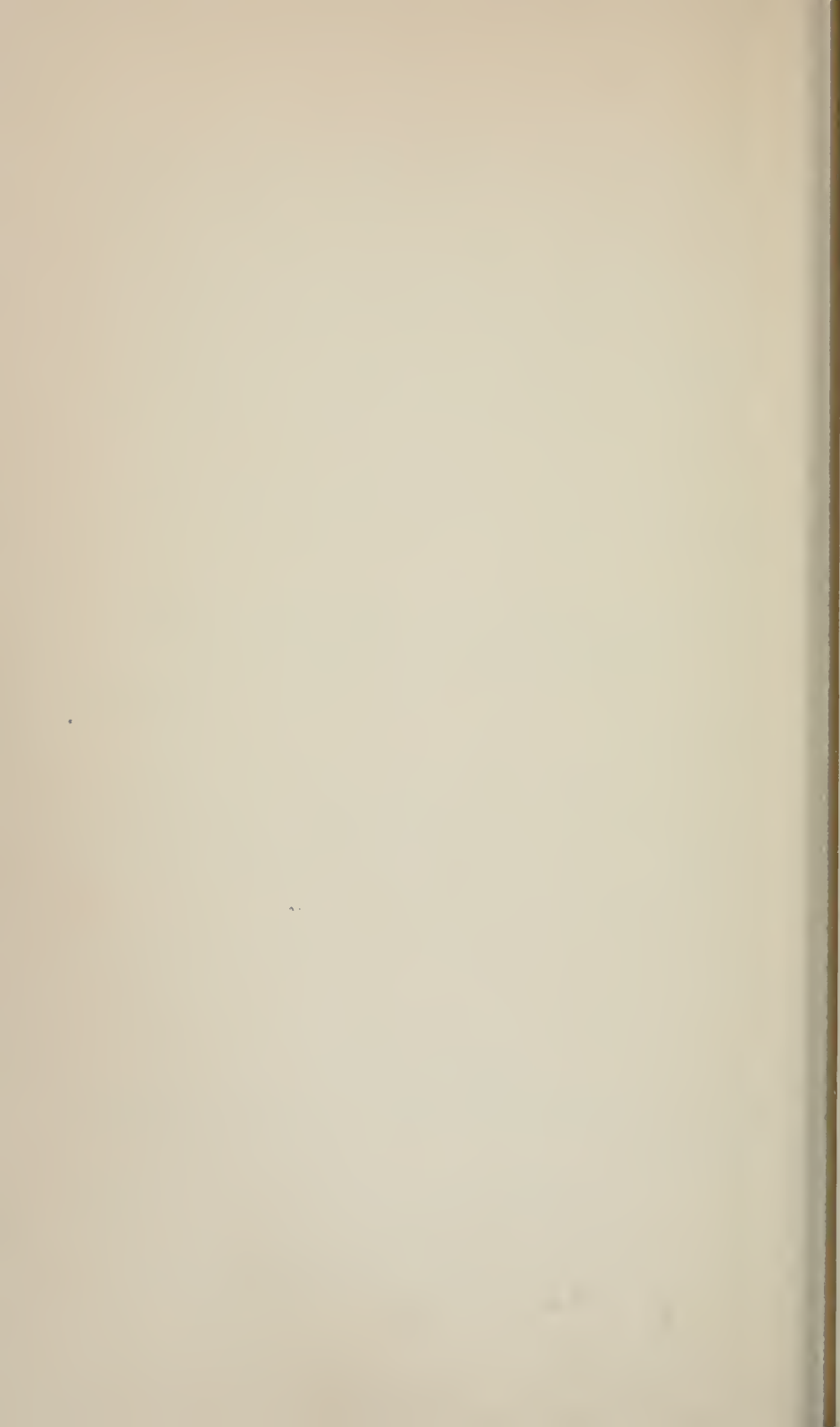
See also *In re McCallum* (DC ED Pa.), 113 Fed. 393.

CONCLUSION

It is respectfully submitted that the lower court must be affirmed.

Respectfully submitted,

C. X. BOLLENBACK,
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No. 15647 ✓

United States Court of Appeals
FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

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No. 15647

United States Court of Appeals

FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Western District of Washington, Northern Division. [R. 14-17]¹ The District Court had jurisdiction under Title 18, § 3231, U. S. C. The indictment charged an offense against the Universal Military Training and Service Act (50 U. S. C. App. § 462). [R. 3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the

¹ Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. [R. 16-17]

STATUTES INVOLVED

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

“The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.”—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the Act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncom-

batant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected

to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.”—50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the Act (50 U. S. C. App. § 462(a)) provides:

“... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment ...”

REGULATIONS INVOLVED

Section 1622.1(d) of the Regulations

Section 1622.1(d) of the Selective Service Regulations (32 C. F. R. § 1622.1(d); E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

“General Principles of Classification.—... (d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, reli-

gious, or other organization. Each such registrant shall receive equal justice."

Section 1622.14 of the Regulations

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E. O. 10420, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.)

Section 1626.25 of the Regulations

Section 1626.25 of the Regulations (32 C. F. R. § 1626.25; E. O. 10363, 17 F. R. 5456, June 18, 1952) reads as follows:

"Special provisions when appeal involves claim that registrant is a conscientious objector. (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious

training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

“(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

“(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed

forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

“(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.”

Section 1626.26 of the Regulations

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (E. O. 9988, 13 F. R. 4874, Aug. 21, 1948; redesignated at 14 F. R. 5021, Aug. 13, 1949)) reads as follows:

“Decision of Appeal Board.—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

“(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board

from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

STATEMENT OF THE CASE

Appellant was charged by indictment which alleged that he on the 24th day of September, 1956, at Seattle, Washington, "did knowingly, wilfully and unlawfully fail, neglect and refuse to perform a duty required of him by the Selective Service Act of 1948, and the rules, regulations and directions made pursuant thereto, in that having been duly and regularly ordered by his local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

"All in violation of Title 50, U. S. C., Appendix 462." [R. 3]

Appellant pleaded not guilty and waived the right of trial by jury. [R. 44-45]

He caused to be issued a subpoena *duces tecum* upon the Agent in Charge of the FBI and upon the United States Attorney to produce the full and complete secret FBI investigative report used by the hearing officers of the Department of Justice in conducting hearings and making reports on the conscientious objections of appellant. [R. 4] The Government moved to quash the subpoena. [R. 5] This was supported by an affidavit that appellant had been supplied a summary of the investigative reports and the production of the reports could serve "no useful evidentiary purpose whatever in the trial of this cause and that the production of same would be contrary to the best interests of the people of the United States." [R. 7]

Appellant answered the motion to quash by affidavit showing that the purpose of subpoenaing the secret FBI investigative reports was to establish that he was prejudiced before the appeal board because the Department of Justice withheld from the appeal board favorable evidence and that until the FBI report was produced and compared

with the résumé it would be impossible for the court to decide the question involved. [R. 8-9] The motion to quash was argued at great length. [R. 23-38] The court sustained the motion to quash. [R. 10]

The case proceeded to trial. The draft board file was received into evidence as Government's Exhibit 1. [R. 47-48] It is a photostatic copy of the entire draft board file, consisting of 102 pages. The facts revealed by the draft board file shall now be stated.

Jerry Keith Rogers was born November 18, 1932, at Okanogan, Washington. (100)² He registered with Local Board No. 5, Seattle, Washington, on November 20, 1950. (44) On October 17, 1951, the local board mailed to him a classification questionnaire. (95) The questionnaire was filled out and returned to the local board on October 29, 1951. (95)

Appellant showed in the questionnaire that he was a minister of religion, having been formally ordained as a minister of Jehovah's Witnesses on December 17, 1950, at Seattle, Washington. He showed that, since that date, he regularly served as a minister. (97) He showed that he did odd jobs as his secular work. (98-99) The questionnaire showed that he was graduated from high school. (100)

Appellant also signed the conscientious objector blank certifying that he was opposed to both combatant and non-combatant military service. (101) He claimed classification as an ordained minister of religion and asked to be put in Class IV-D. (101)

The local board on November 7, 1951, mailed to him the conscientious objector form. He signed Series I (B) certifying "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces." (85) In the form he was asked: "Do you believe in a Supreme Being?" He answered: "Yes." The form then asked

² Numbers appearing in *parentheses* herein refer to the pages of the draft board file (Government's Exhibit 1). Such page numbers, written in longhand, appear at the bottom of each page of the file.

him to "describe the nature of your belief which is the basis of your claim." He answered:

"Inasmuch as Jehovah has chosen his witnesses out of the world to be ambassadors to the peoples of earth in behalf of his kingdom, they are not a part of the world. Since their allegiance is to Almighty God and his kingdom they do not participate in local, national or international elections or politics. From such they are exempt by the law of Almighty God, who commands them to remain unspotted from the world. (James 1:27) Like Christ Jesus and his apostles, who set the example to follow, they are in the world but are not a part of it. (John 17:16, 17; 15:17-19) Another reason why they abstain from the world is that the Devil is the invisible ruler thereof, and they know that to be a friend of the world is to incur the enmity of Almighty God. (James 4:4; II Corinthians 4:4)

"As to a Supreme Being, it is written at Romans 13:1-3:

"'Let every soul be in subjection to the higher powers: for there is no power but of God; and the powers that be are ordained of God. Therefore he that resisteth the power withstandeth the ordinance of God. And they that withstand shall receive to themselves judgment. For rulers are not a terror to the good work, but to the evil. And wouldest thou have no fear of the power? Do that which is good, and thou shalt have praise from the same.' " (90-91)

He answered the question how, when and from what source he received his religious training and belief, which was the basis of his conscientious objections, as follows: "In 1949 I began to study the publications of the Watchtower Bible and Tract Society. By studying these regularly and by attending meetings and lectures on the Bible I have come to a knowledge of the Bible and the purposes of Jehovah God." (86)

He answered that he believed in the use of force in response to question II 5, as follows: "The only force I believe in is immediate self protection of myself and my friends, and that force which is commanded by God." (86)

He described the actions and behavior in his life that, in his opinion, most conspicuously demonstrate the consistency and depth of his religious convictions, as follows: "Throughout a week I study 3 and sometimes 4 books on the Bible. I go out in a prescribed territory to preach the word. Twice a week I attend meetings to further my knowledge in the Scriptures." (86)

In the form under Series III he listed the names and addresses of the schools that he had attended, the names of his employers and his places of residence. (86-87)

Series IV he answered as follows:

"1. Have you ever been a member of any military organization or establishment? . . . No.

"2. Are you a member of a religious sect or organization? Yes. . . . (a) State the name of the sect, and the name and location of its governing body or head if known to you. Jehovah's Witnesses Watchtower Bible and Tract Society 117 Adams St. Brooklyn (1) New York or 124 Columbia Hts. Brooklyn (2) N.Y. (b) When, where, and how did you become a member of said sect or organization? In 1949 in Seattle I started studying Bible aids printed by the Watch Tower Bible & Tract Society. (c) State the name and location of the church, congregation, or meeting where you customarily attend. Kingdom Hall of Jehovah's Witnesses 3856 23rd S.W. Seattle, Wash. (d) Give the name, title and present address of the pastor or leader of such church, congregation, or meeting. Ernest R. Lintow Company Servant 9675 48th S.W. Seattle, Wash. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war. We have no official statements or creeds as to going to war except the Bible in this regard. (87) . . . Each minister of Almighty God as a follower of Christ Jesus claims his exemption from military training and service. He is in the army of Christ Jesus, serving as a soldier of Jehovah's appointed commander, Christ Jesus. (II Timothy 2: 3, 4) Inasmuch as the war weapons of the soldier of Christ Jesus are not car-

nal, he is not authorized by his commander to engage in carnal warfare of this world. (2 Corinthians 10:3, 4) Furthermore, being enlisted in the army of Christ Jesus, he cannot desert the forces of Jehovah to assume the obligations of a soldier in any army of this world without being guilty of desertion and suffering the punishment meted out to deserters by Almighty God. (92) 3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations. I was a member of the Boy Scouts for a short period of time during the year 1947 with no prescribed activities out of the ordinary." (87)

Appellant in Series V gave as his references the following persons: Mrs. Leona Hagenback and Mr. J. F. Hagenback, Seattle, Washington, and Mr. L. Morgan Porttman and Mrs. Neoma Porttman, Ridgefield, Washington. (88)

Appellant was commanded by the local board to come for a preclassification hearing on December 11, 1951. He appeared. The local board made a memorandum of his personal appearance, as follows:

"Question: Is it fair to make some one else take your turn and for you to be deferred.

"Answer: Bible states that Christ had nothing to do with affairs of the world. Anyone who preaches the gospel of the kingdom is a minister. We do not believe in burdening others with our upkeep so we work at something to make a living.

"Question: Where do you work?

"Answer: Bethlehem Steel. Now unemployed.

"Question: Don't you have a desire to protect a country which gives you the freedom to have your religion? Are you indicating that you will take no part in combatant or noncombatant service.

"Answer: Would not do anything to protect rights. It is more important to do God's will than man's will.

"Question: If country was invaded would you protect yourself. . . .

“Answer: I would not kill.

“Question: Does your religion prohibit saluting the flag.

“Answer: I did salute the flag until I learned better. I would not salute it now.” (84)

The local board on December 11, 1951, classified him I-A, of which he was mailed notice. (102) Rogers appealed on December 17th by letter. (82-83) On July 9, 1952, the appeal board classified him I-A. (102) On September 9, 1952, the file was called in to the office of the State Director from the local board so that it could be referred to the Department of Justice for an advisory opinion as required by Section 6(j) of the Act. The file was referred to the Department of Justice. (76-77)

The Department of Justice on August 19, 1954, wrote the appeal board a letter of recommendation. It reads, among other things, as follows:

“As required by section 6(j) of the Universal Military Training and Service Act, an inquiry was made in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable John W. Keane, Hearing Officer for the Western District of Washington.

“The registrant is twenty-one years of age, unmarried and resides with his mother in Seattle, Washington. His father is living but separated from the family. The registrant is a high school graduate and he has been employed on a full-time basis at Sears-Roebuck Company as a stock clerk. Together with his mother, the registrant is a member of the Jehovah's Witnesses and he claims exemption from both combatant and noncombatant training and service on grounds of conscientious objection.

“Attached hereto and made a part hereof are a resumé of the investigative report made in this matter and Exhibits marked A through H submitted to the Department of Justice in behalf of the registrant.

“The registrant personally appeared at the hearing un-

accompanied and he informed the Hearing Officer that he did not have any early religious training but that he had been baptized in the Jehovah's Witnesses organization in December, 1950, and that he had attended meetings regularly since that time. The registrant stated that his mother has been a Jehovah's Witness since 1947 and that since December, 1950, he has spent three to four hours a week in religious activity. He further stated that he first concluded that he was a conscientious objector in December, 1950. He said he principally relied on the Commandment 'Thou Shalt Not Kill' as a basis for his objection to war and the teaching of the Bible to 'Love Thy Neighbor as Thyself.'

"The Hearing Officer stated it appeared that the registrant based his contention that he was a conscientious objector upon his abhorrence of killing another human being. The Hearing Officer stated that the registrant did not claim that the Jehovah's Witnesses Society taught its members to be conscientious objectors or that there was any rule in that respect. The Hearing Officer further advised that when questioned with respect to participation in noncombatant training and service the registrant did not support his opposition on any teaching that he had acquired from the Jehovah's Witnesses Society other than [sic] that he was a minister of the Gospel and if he were inducted into the armed services it would not leave him free to pursue his avocation. The registrant stated that such service would interfere with his religious activity and that under the teachings of his religion he should remain unspotted from the world.

"On the basis of the entire record including his personal observation of the registrant the Hearing Officer concluded that the registrant is conscientiously opposed to war in any form which involves the taking of human life and that the registrant's conscientious objections with respect to participation in combatant training are based upon his religious training and beliefs. On the other hand, however, the Hearing Officer concluded that the registrant has failed to estab-

lish that he is conscientiously opposed to noncombatant training and service in the armed forces as a result of religious training and belief. The Hearing Officer, therefore, recommended a I-A-O classification.

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections are sustained as to combatant training and service only. It is, therefore, recommended to your Board that the registrant be classified in Class I-A-O.

"The Selective Service Cover Sheet in the above case is returned herewith." (62-63)

Attached to the recommendation was a résumé of the investigative report, which reads, among other things, as follows:

"The registrant was born at Okanogan, Washington, November 18, 1932. He has resided in Seattle, Washington, since 1942. He registered with the Selective Service November 20, 1950, and filed Form I-150 as a conscientious objector in November, 1951. He claims as an exemption that he is a duly ordained minister. He graduated from West Seattle High School June 12, 1951. He was an above-average student. School records do not reflect any disciplinary or corrective action. He has been employed as a stock clerk at Sears-Roebuck Company, and has been actively participating in the Jehovah's Witness Society. Neighbors, references and acquaintances state that he has been an active member of the society and that he enjoys an excellent reputation of character. There is nothing in the investigative report which would indicate he is not sincere in his claim to being a conscientious objector on the basis of his religious training and belief.

"Prepared June 17, 1954" (64)

Several affidavits were filed showing the sincerity of the appellant, his consistent activity in the organization as a minister and the fact that he is the sole support of his mother who needs his support. These affidavits were signed by Al Evans, D. David McDowell, Mrs. W. O. Bradbury,

E. F. Larkin, M.D., Ernest Max Endlich, Mrs. Ernest M. Endlich, Jack A. Brandt, Charles E. Otto and R. Ernest Lintow. (66-73)

On September 14, 1954, the appeal board classified appellant I-A-O. (102)

On October 6, 1954, the local board requested appellant to appear before it six days later. (55) He appeared before the local board on October 12, 1954. At the hearing appellant was required to sign a two-page questionnaire. The larger part of the memorandum related to his ministerial claim. (52-54) That part of the questionnaire relating to his conscientious objector claim reads as follows:

"Under what circumstances do you believe in the use of force? In armed force to defend my family. It would have to be a theocratic war before we would participate.

"Do you believe in the use of force, in the event of attack, to defend yourself? Yes

"Your family? Yes Your home? Yes Your religious meetings? Yes

"The brethren of your religious organization? Yes Your country? No

"Did your conscientious objection to participation in war in any form develop from the suggestion or argument of other persons? I found out for myself from the teachings of the Bible.

"Is your conscientious objection based primarily upon your desire to preach? Yes

"If you were classified as a conscientious objector, would you perform civilian work in the national interest for a period of 24 consecutive months? No If not, why not? The Bible says we shall not become friends of the World. Friendship with the World is enmity with God." (54)

The local board on April 19, 1955, classified appellant I-A-O. (102) On May 24, 1955, the file was reviewed by the government appeal agent and forwarded to the State Director for transmittal to the appeal board, after the govern-

ment appeal agent had taken an appeal for appellant. (49, 102)

On August 1, 1955, the file was forwarded to the State Director for transmittal to the appeal board. (31, 102) Following the FBI investigation appellant was informed to appear before Hearing Officer Lundin in Seattle, Washington. [R. 49-50] He appeared with his mother at the office of the hearing officer. [R. 50] The hearing officer informed appellant that "he was a Bible student, and that he would like to have me state my reasons for not joining the Armed Forces, and I proceeded to show him through various citations in the Scriptures. [¶] At the end of this, I was informed by Mr. Lundin that he could not see that the testimony I had given had too much bearing on the subject, as to why I should not go and, to which I asked him if he could show me a Scripture that stated I should; and at this point he seemed rather agitated and refused to answer on the grounds of his objections; and that was just about it, so far as the testimony went." [R. 50-51]

Appellant's mother was with him at the hearing. Concerning it she testified:

"We entered his office and he asked us to be seated, and he asked my son if he could tell in his own words why he wouldn't enter the Armed Services; and my son said that he had various reasons why he wouldn't, and he quoted several Scriptures, stating that we fight not with carnal weapons, and that we are a soldier of Christ Jesus, and after he had quoted several Scriptures to substantiate his claim, Mr. Lundin said he didn't think that that would bear witness to his testimony, or wouldn't be sufficient, I should say, for his grounds of not going into the Armed Services.

"It was then that my son asked him if he could—the reason, he was a Bible student—could he give him one Scripture that would say he should go into the Armed Services, and he became quite irate, and said he didn't have to answer to him for anything; and he went on speaking about

the Scriptures, trying to further substantiate our claim . . .” [R. 53-54]

“Q. (By Mr. MacDonald): Do you recall that there was any statement concerning—at that time concerning other people going into the Military Service?

“A. He said he couldn’t see why, if other boys went in, he wouldn’t.

“Q. When you say ‘he,’ who do you mean? [46]

“A. Mr. Lundin. ‘Because if other boys can go in, I don’t see why you shouldn’t fight for your country.’” [R. 54-55]

Following the hearing the Assistant Attorney General in Washington, D. C., wrote a letter to the chairman of the appeal board making a recommendation on the claim as follows:

“As required by section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Alfred H. Lundin, a Hearing Officer for the Department of Justice.

“The information obtained from the supplemental inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resumé of the Supplemental Inquiry attached hereto and made a part hereof.

“Registrant is 23 years old. He was graduated from West Seattle High School in June 1951 and he is presently employed as a store clerk at Sears - Roebuck Company. Registrant’s mother has been a Jehovah’s Witness since 1947 and registrant was baptized in the sect in 1950. He claims exemption from both combatant and noncombatant military training and service by reason of his religious training and belief.

“SSS Form No. 150 and addenda attached thereto reflect that registrant bases his conscientious-objector claim on his belief in a Supreme Being to Whom he is subservient.

He acquired his beliefs through study of the Watchtower Bible and Tract Society publications and through attendance at Bible study meetings. He believes in the use of force only in cases of self-defense.

"At the time of the first hearing, the registrant told the Hearing Officer that he bases his conscientious objection to combatant military training and service principally upon the Commandment "Thou Shalt Not Kill." Registrant, however, did not base his conscientious objection to noncombatant training and service upon any teaching that he had acquired from the Jehovah's Witnesses society. Rather, he based his claim upon the fact that he was a minister of the Gospel and if he were inducted into the armed services it would not leave him free to pursue his avocation. The registrant stated that such service would interfere with his religious activity and that under the teachings of his religion he should remain unspotted from the world. As a result of the first hearing, the Hearing Officer and the Department of Justice concluded that registrant had sustained his conscientious-objections to combatant training and service based upon his religious training and belief but had failed to sustain his conscientious objections to noncombatant military training and service.

"The registrant appeared for his second hearing accompanied by his mother. He stated that Jehovah's Witnesses desire to refrain from all types of warfare and he cited different portions of the Bible to confirm his stand. With respect to noncombatant service, the registrant stated that if one assists as a noncombatant, it is the same as killing. His mother volunteered that Jehovah's Witnesses do not vote and seemed to think that this was a factor which might effect her son's status.

"The Hearing Officer found that registrant appeared to be a bright young man. He also noted that 'the registrant and him mother did not offer anything to change the findings of the previous Hearing Officer, and that the registrant has failed to establish that he is conscientiously opposed to

noncombatant training and service in the armed forces as a result of religious training and belief.' Consequently, he recommended that registrant be granted a I-A-O classification.

"With respect to registrant's statement to the first Hearing Officer that he was conscientiously opposed to noncombatant military training and service because it would interfere with his ministerial and preaching work, we invite your attention to the case of *Tomlinson v. U.S.* 216 F. 2d 12, wherein the registrant's real objection to noncombatant service appeared to be that it would interfere [sic] with his carrying the 'message' and doing what he chose to call 'ministerial work.' In this case, the Court held:

"'An objection on religious grounds, to an assignment which would take the registrant away from his missionary activities, is not an objection which the Act recognizes.'

Although the registrant offered another explanation to support his objections to noncombatant training and service to the second Hearing Officer, he did not abandon his first basis but merely added to it. Consequently, the Department of Justice concludes that whereas the registrant has sustained his conscientious objections to combatant military training and service based on his religious training and belief, he has failed to sustain his conscientious objection to noncombatant military training and service. Accordingly, we recommend that the registrant be classified I-A-O.

"The Selective Service Cover Sheet in the above case is returned herewith." (35-37)

Accompanying the recommendation was a résumé of the FBI investigative report, which reads as follows:

"The registrant was born November 18, 1932. He is still employed as a stock clerk at Sears Roebuck Company, Seattle, Washington. A former supervisor stated that he had no reason to alter his opinion concerning the registrant from the previous investigation and felt that he is a con-

scientious employee of good character, undoubtedly sincere in his objection to military service. The registrant's present supervisor stated that the registrant is honest, dependable, and an excellent employee. He believes the registrant is acting in good faith in opposing military service. He pointed out that about one year ago, the registrant became seriously ill with a kidney ailment, but refused to seek medical care, stating that he believed in 'faith healing.'

"Neighbors, references, and religious affiliates all agreed that the registrant is of excellent character and reputation and a sincere active member of Jehovah's Witnesses. None had any unfavorable information concerning the registrant's character; many of the same persons were previously interviewed and advised presently that they had no reason to change their opinion of the registrant. All persons interviewed believed that the registrant is sincere in his religious beliefs and in his attitude toward military service. It was learned that the registrant married in July 1954. Many members of Jehovah's Witnesses advised that the registrant is actively engaged in religious work of the sect, including the Theocratic Ministry School and home Bible studies. An official of Jehovah's Witnesses, who maintains service records for the registrant, advised that the registrant devoted a total of sixty-five hours to religious field service work from September 1954 through August 1955.

"Records at the Seattle Credit Bureau reflect no credit rating for the registrant, but reflect that a marriage license was issued at Seattle on July 3, 1954, to the registrant and Barbara R. Uhrich, age eighteen. Credit records also reflected that Lawrence N. Rudolph sued the registrant's mother for divorce on January 29, 1953, in King County Superior Court, with the final decree being granted on May 8, 1953.

"There is no arrest record for the registrant or his mother at the Seattle Police Department or King County Sheriff's Office, but the traffic files of the Seattle Police Department reflect that on February 12, 1953, the registrant

was cited for running a red light. Records reflect that he forfeited \$6.00 bail. He was again cited on June 22, 1953, for an unlawful muffler, but was cleared by test. Records further reflect that on December 3, 1953, the registrant was cited for speeding and forfeited \$20.00 bail." (38-39)

Appellant was mailed a copy of the recommendation along with a résumé. He answered this by letter dated June 11, 1956, reading as follows:

"In reply to your recent letter I wish to state that I have read it very carefully, the report from the Justice Department and at this time I would like to make the following facts clear to the Appeal Board.

- "1. My claim for exemption as a Conscientious Objector is based solely on the fact that I am a regularly ordained Minister of the Gospel.
- "2. Because of this I wish to notify the Board of my request to be classified as a Minister 4D. In support of this I submit the following information some of which you have on file.

"Prior to 1950 I took up the study of the scriptures. Then after coming to an accurate knowledge I decided to dedicate myself to God and take up his ministry. In December of 1950, I was officially ordained an active Minister of the Watchtower Bible and Tract Society. This organization I know is being used by God as his channel of communication to mankind here on earth. It is imperative that I continue the duties assigned to me by this Society in order to fulfill my ordination as a Minister and a dedicated Servant.

"One of God's commands is to preach his thoughts to others. This I engage in regularly. During the course of a week I undertake many activities to fulfill my obligation. I have been assigned by the Watchtower Bible and Tract Society as a Congregation Book Study Conductor. This duty entails leading a group of fellow Ministers in an instructive Bible Study. It is my responsibility to see that they become efficient Ministers.

"I would like to outline for you my weekly seedule [sic]

of activity to substantiate my recognition as a Minister. For example on Monday I devote several hours to personnal [sic] study in preparation for studies, I lead during the week. Tuesday I lead the Congregation Bible Study. Then on Wednesday and Thursday I conduct personnal [sic] Bible Studies with interested persons. Friday I attend the Congregations Theocratic Ministry School where I am enrolled as a student speaker where I participate in learning public speaking. On this same program I participate in what is called the Service Meeting wherein we learn better methods of preaching to the public. On Saturday I lead a group in Ministering to the public in the territory assigned me by the Watchtower Bible and Tract Society. Sunday morning this is repeated with the use of an extended sermon. Then Sunday evening I attend another Public Meeting which is a Bible lecture followed by an extensive study in the scriptures.

“With this resumé of my duties and activities I’m sure you can appreciate more fully my stand as a Minister of God, and my claim of exemption from all Military Duty. Your past classification requires me to desert my position and take up your cause. It would require me to give you my service and allegiance. It would require breaking of my covenant with God, Romans 1:31 & 32.

“As you undoubtedly [sic] know I cannot serve two masters exceptibly [sic] nor could I serve two causes at the same time. (2 Timothy 2:3 & 4) This necessitates [sic] my analyzing [sic] your request very carefully. As I see it you want me to enroll in your Army as a soldier to accomplish the objectives of this wordly [sic] Government.

“I would like to call to your attention at this time two scriptures 2 Cor. 4:4, which shows that Satan is the god of this world and at 1 John 5:19, that shows that the whole world is lying in the power of the wicked one. Also the fact that Satan offered these Kingdoms of the world to Christ when in the wilderness. (Math. 4:8 & 9) From these it is unreasonable to think anything else than that all world

Governments were the Devil's property. How else could he have offered them to Christ.

"More thought along these lines is brought out at James 4:4 which states 'Ye adulterers and adulteresses, know ye not that the friendship of the world is enmity with God? Whosoever therefore will be a friend of the world is the enemy of God.' and also James 1:27 which says, 'Pure religion and undefiled before God and the Father is this, to visit the Fatherless and Widows in their affliction and to keep himself unspotted from the world.' From the foregoing scriptures it is determined that this world is in Satans control and that the Ministers of God should refrain from having anything to do with it. So if I live up to these scriptures I must reject you [sic] 1-A-O classification and ask you to properly classify me 4-D." (32-33)

On June 19, 1956, the appeal board classified appellant I-A-O, denying the full conscientious objector status or the I-A classification. The I-A-O classification made him liable for noncombatant military service as a conscientious objector. (102) On July 13, 1956, he was notified of this classification. (102)

On August 1, 1956, appellant was ordered to report for induction on September 24, 1956. (28, 102) Appellant reported and refused to submit to induction, as is stipulated in the record. [R. 48-49]

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

The question was raised by grounds 4 and 5 of the motion for judgment of acquittal. [R. 13]

II.

Whether the appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the résumé of the FBI report sent to the appeal board was illegal because it omitted favorable evidence appearing in the FBI report that Rogers was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.

This question was raised by the motion to quash and the affidavit in opposition thereto, together with the order of the court thereon. [R. 5-10]

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all of the evidence.

II.

The district court committed reversible error in quashing the subpoena *duces tecum* commanding the production of the original full secret FBI investigative report used by the hearing officer and the Assistant Attorney General in making the recommendation to the appeal board which was needed for the purpose of showing that the Department of Justice withheld from the appeal board favorable evidence appearing in such FBI report that was not put into the résumé forwarded to the appeal board.

A R G U M E N T

O N E

The denial of the claim for classification as a conscientious objector was without basis in fact and the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

Section 6(j) of the Act (50 U. S. C. App. § 456(j)) previously quoted in full at pages 2-4, *supra*, provides that a full conscientious objector is one who is opposed to participation in both combatant and noncombatant military service by reason of religious training and belief. The pivotal fact on which the exemption hinges, according to the Act, is that the belief must be in the Supreme Being and that the belief involves "duties superior to those arising from any human relation."

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; see page 5, *supra*) provides the same as does the statute.

The documentary evidence submitted by Rogers establishes that he had sincere and deep-seated conscientious objections against his participation in combatant and non-combatant military service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry. (32-33, 35-39, 54, 62-64, 72-73, 84, 85-91)

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be de-

terminated is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like appellant here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. See *Jessen v. United States*, 212 F. 2d 897 (10th Cir. 1954), where the Tenth Circuit (after following *Taffs v. United States*, 208 F. 2d 329 (8th Cir. 1953)) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts of appeals with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Schuman v. United States*, 208 F. 2d 801 (9th Cir. 1953); *Clark v. United States*, 217 F. 2d 511 (9th Cir. 1954) (rehearing denied 221 F. 2d 480 (1955)); *Pine v. United States*, 212 F. 2d 93 (4th Cir. 1954); *Annett v. United States*, 205 F. 2d 689 (10th Cir. 1953); *United States v. Pekarski*, 207 F. 2d 930 (2d Cir. 1953); *Taffs v. United States*, 208 F. 2d 329 (8th Cir. 1953); *Jewell v. United States*, 208 F. 2d 770 (6th Cir. 1953); *United States v. Hartman*, 209 F. 2d 366 (2d Cir. 1954); *Weaver v. United States*, 210 F. 2d 815 (8th Cir. 1954); *Jessen v. United States*, 212 F. 2d 897 (10th Cir. 1954); *United States v. Close*, 215 F. 2d 439 (7th Cir. 1954); *United States v. Wilson*, 215 F. 2d 443 (7th Cir. 1954).

These cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of

those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so far as the statements in the draft board record showing conscientious objection are concerned.

The appeal board was advised by the Department of Justice in its recommendation to hold against the appellant because the hearing officer on the second hearing stated that appellant "did not offer anything to change the findings of the previous Hearing Officer." (36) This recommendation showed an illegal procedure was followed. The appeal board was told to give effect to the first recommendation. It was itself illegal and improperly misled the appeal board as to the status of the case of appellant. It told the board that the burden was on the appellant to prove grounds for setting aside the former recommendation or that he had to offer new evidence to change the old classification.

The second appeal and the second reference completely set aside the effects of the original hearing and recommendation. *Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir 1951); *Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954); compare *Davidson v. United States*, 218 F. 2d 609 (9th Cir. 1954) (reversed and remanded on other grounds, 349 U. S. 918 (1955)). It was the duty of the Department of Justice and the appeal board to reconsider the case according to the status of appellant at the time of the second appeal and not according to the facts existing at the time of the first appeal. *United States ex rel. Hull v. Stalter*, 151 F. 2d 633 at pages 635, 638 (7th Cir. 1945). Since the appeal board adopted this erroneous view there is no basis in fact for the classification. See the last sentence in *Affeldt v. United States*, 218 F. 2d 112, 115 (9th Cir. 1954).

The Department of Justice also illegally instructed the appeal board that the opinion of this Court in *Tomlinson v. United States*, 216 F. 2d 12, 18 (1954), applied. (36-37) The facts in this case are entirely different from those in the *Tomlinson* case. The decision in *Tomlinson v. United States*, 216 F. 2d 12 (1954), is based upon "attitudes" and "demeanors" shown by the registrants upon personal appearance before the local board. There is no showing of a bad attitude or demeanor before either the local board or the hearing officer in this case. The record of hearings made by both fails to show any such bad conduct.

The sole basis for invoking the doctrine of *Tomlinson v. United States*, 216 F. 2d 12 (1954), is not what appellant said at the second or final hearing. It is based upon what occurred at the first hearing and which was not called to his attention at the second hearing. It is significant as to what the Department of Justice says in the second recommendation: "Although the registrant offered another explanation to support his objections to noncombatant training and service to the second hearing officer, he did not abandon his first basis but merely added to it." (37) Reliance upon statements made at the first hearing is in violation of the principle laid down in *Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir. 1951).

In the event that the Department of Justice recommendation is taken as true by this Court then it means that none of Jehovah's Witnesses is entitled to the conscientious objector classification. All of Jehovah's Witnesses take the position that, while the Bible commands strict neutrality to all worldly wars as a basis for their conscientious objection, they make the claim so they can be free to preach the Gospel of God's kingdom. See *Sicurella v. United States*, 348 U. S. 385 (1955). Surely this Court does not intend to permit the Department of Justice to hold that the law of this circuit is that all of Jehovah's Witnesses are not entitled to claim classification as conscientious objectors. The motive for making the conscientious objection claim is stated to be

freedom of the registrant to preach. But the legal basis of the objection under the Act is their religious training and belief in strict Bible neutrality from worldly affairs and the supreme relationship to Jehovah God over any human relationship. This belief is what brings them under the statute. The motive of making the claim so as to be free to preach the gospel does not affect this legal basis of neutrality for the claim.—*Sicurella v. United States*, 348 U. S. 385 (1955).

It is submitted that *Tomlinson v. United States*, 216 F. 2d 112 (9th Cir. 1954), is distinguishable. If it cannot be found to be distinguished from the facts in this case then this Court is requested to reconsider the decision in *Tomlinson v. United States*, 216 F. 2d 112 (9th Cir. 1954), because it is erroneous. It is stated in *Tomlinson v. United States*, 216 F. 2d 12, 17 (9th Cir. 1954), that "attitudes and demeanors which develop at the time of such a person's personal appearance may well be controlling factors." Yet there was no development in the record of disbelief or that Tomlinson was lying. There was no pointing to anything that contradicted what Tomlinson said. The Court relied upon the report of the hearing officer as basis in fact for the denial of the conscientious objector claim. Yet all the hearing officer did was to find that Tomlinson and his witness established orally at the hearing exactly what was shown in the written papers. This Court proves that he merely repeated what was in his papers by stating that the summary of the hearing made by the hearing officer "reflects the registrant's general attitude as expressed in his letters."

In the face of the record that there was nothing contradictory in the papers or that impeached what Tomlinson said, this Court wove a web of basis in fact around the case by saying that there was a hearing and that since the hearing officer could observe the attitude of Tomlinson toward war and other service his recommendation against Tomlinson was final and unreviewable. The holding of the Court, which speculates and presumes against Tomlinson without a

written record, is in conflict with *United States ex rel. Kulick v. Kennedy*, 157 F. 2d 811 (2d Cir. 1946), where it was held that if a draft official at a hearing disbelieved a registrant it is necessary to make a memorandum of such disbelief. The Court was not authorized to speculate that the hearing officer judged Tomlinson adversely because of demeanor. The process of reaching basis in fact by speculation employed by the Court in *Tomlinson v. United States*, 216 F. 2d 12 (9th Cir. 1954), is so great a departure from federal administrative law that it is of the greatest importance that the Court's decision be reconsidered.

The religious objections of appellant to the performance of any military service under the Act, going beyond objections to military service but including opposition to such service, do not constitute a basis for a denial of the conscientious objector status. The Department of Justice held that because appellant objected to doing anything as one of the military forces and wanted to have no part of the war effort of the nation, and because he did not limit his objections to military service, he was not a conscientious objector.

This holding of the Department of Justice was an unduly restrictive interpretation of Section 6(j) of the Act. There is nothing in the Act or the legislative history of it that indicates Congress intended to limit the religious beliefs of conscientious objectors or prescribe what is orthodox for conscientious objectors. The Department of Justice read into the Act an illegal importation that conflicts with the intent of Congress. This construction of the law emasculates the conscientious objector provisions to such an extent that it is imperative that the judgment ought to be reversed in this case to correct the holding of the Department of Justice.

The Act and the Regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that is illegal.

Section 6 (j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the Regulations. These make the recommenda-

tion a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.

The refusal by the Department of Justice to follow the definition of a conscientious objector fixed by Congress in the Act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all."—*Shepherd v. United States*, 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella v. United States*, 348 U. S. 385 (1955).

Congress did not intend to confer upon the draft boards or the courts arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It is submitted that here the undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson v. United States*, 126 F. 2d 242, at page 247 (8th Cir. 1942).

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The I-A-O classification (making appellant liable for noncombatant military service) was on its face arbitrary and capricious because it is a compromise classification.

A decision directly in point supporting the proposition

made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector), are arbitrary and capricious is *United States v. Relyea*, No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

"I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee accompanies this brief.

A similar holding was made by United States District Judge Murray in *United States v. Goddard*, No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

"... after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such

classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head v. United States*, 199 F. 2d 337 (10th Cir. 1952), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case which impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Rogers belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Rogers was not impeached in his good faith. Here the hearing officer of the Department of Justice recommended in favor of the good faith conscientious objections of appellant. It suggested that he be classified, not in I-A or I-A-O but in I-O. In the *Head* case there was no such recommendation. In the *Head* case there was no subpoena and demand for production of the FBI report and there was no withholding of evidence, as in this case.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscien-

tious objector who was willing to perform noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The appeal board classified appellant as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected it. The appeal board had no authority to compromise his claim. He either was telling the truth and was entitled to a IV-E classification (or I-O) or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence it accepted the facts and made a determination that was without basis in fact, arbitrary and capricious.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the appeal board and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

TWO

The appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the résumé of the FBI report sent to the appeal board was illegal because it omitted favorable evidence appearing in the FBI report that Rogers was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.³

This ruling of the court below, denying appellant the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board, is out of harmony with *Jencks v. United States*, 353 U. S. 657, 671, (1957).⁴ There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. Here the summary of the FBI report was a "witness" against appellant in the appeal board. In the trial court, as a basis for acquittal, the appellant in this case contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U. S. C. App. § 451 (c); see *supra*, page 2) provides for "a system of selection which is fair and just." Appellant to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating

³ *Blalock v. United States*, — F. 2d — (4th Cir. Aug. 7, 1957, No. 7435), is contrary. But see *United States v. Jacobson*, W.D. Wash., No. 49652, July 15, 1957, supporting appellant (slip opinion accompanies this brief).

⁴ The recent Act of Congress amending the Criminal Code relating to the production of FBI reports in criminal cases is set forth in full in Appendix B, *infra*, pages 74-76.

him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the FBI report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the appellant was entitled by procedural due process of law in the district court to attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call his "witness" (the FBI report), by the order quashing the subpoena *duces tecum*.

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales v. United States*, 348 U. S. 407 (1955); *Simmons v. United States*, 348 U. S. 397 (1955); and *Sicurella v. United States*, 348 U. S. 385 (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting appellant's conscientious objector claims. This is through making an incomplete or inaccurate summary of the FBI reports, suggested in *United States v. Nugent*, 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries.

The precise question here presented has not been presented to this Court before. It was not decided in *White v. United States*, 215 F. 2d 782, 790-791 (9th Cir. 1954), nor *Campbell v. United States*, 221 F. 2d 454, 459-460 (4th Cir.

1955). Those two cases held that it was not error to exclude evidence or to quash a subpoena *duces tecum* commanding the production of the FBI report to determine whether a full and fair summary of the *unfavorable* or adverse evidence was or was not given to the registrant.

The two decisions were apparently based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States v. Nugent*, 346 U. S. 1 (1953), with *Gonzales v. United States*, 348 U. S. 407 (1955). See also the order on rehearing in *Campbell v. United States*, 221 F. 2d 454 (4th Cir., No. 6906), dated April 14, 1955. The question decided in the *Campbell* and *White* cases, *supra*, was presented to the Supreme Court in *Simmons v. United States*, 348 U. S. 397 (1955), but not decided by it. Read what the Supreme Court said in the last paragraph of the opinion in that case, 348 U. S. at page 406.

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrants may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although appellant does not concede this since the question is still

open in the Supreme Court. (See *Simmons v. United States*, 348 U. S. 397 (1955), and *Gonzales v. United States*, 348 U. S. 407 (1955).) But in the case of withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government for not producing the FBI report at the trial where the only question involved is the use of unfavorable evidence.

In determining whether the appellant has been denied a full and fair hearing before the appeal board by the Department of Justice because of withholding favorable evidence appearing in the FBI report the issue is not what the Department told the appeal board in its recommendation. The issue is: What did the Department of Justice fail or refuse to make known to the appeal board that was favorable to the appellant? The résumé of the FBI reports in both these cases appears in the draft board records. But there is absolutely nothing in the recommendations of the Department of Justice or in the summaries themselves to show that all of the favorable evidence in the FBI report or all statements given by witnesses to the FBI were fully summarized or even summarized at all in the résumé.

The compulsory production of the FBI report at the trial can add nothing that does not already appear in the recommendation and résumé sent to the registrant by the appeal board for an answer. But where, as here, favorable evidence supporting the claim for classification as a conscientious objector has been, or may have been, withheld, the judicial function of the federal court to determine whether beneficial evidence has been censored and withheld by the Department of Justice is completely paralyzed—stopped dead in its tracks—until the federal court has (1) compelled the production of the FBI report, (2) examined it and (3) compared it with the résumé sent to the registrant and the appeal board and (4) then decided by such examination whether there has been a withholding of evi-

dence favorable to the registrant in violation of procedural due process of law.

It may be argued by the Government that this Court must rely upon the presumption of regularity in administrative proceedings. Notwithstanding *Koch v. United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States v. Fratricks*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop v. United States*, 165 U. S. 486 (1897), and *Edwards v. United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions. It is submitted, therefore, that it cannot be said that the Department of Justice is presumed to have made a full and complete summary of all the favorable evidence.

It may be argued that this Court cannot assume that there was other favorable evidence in the file. This argument ignores reality. There is no procedure in the Department of Justice that regulates the recommendations of the Department of Justice to the appeal board to command a summary of all the unfavorable evidence. There is nothing in fact to require the Department to refer to any favorable evidence. It can merely recommend that the conscientious objector claim be sustained or denied. It should be remembered that the recommendation of the Department of Justice is based upon the FBI record, and on it the Department of Justice finds that the registrant's objections to non-combatant service are not sustained.

It is to be seen that the recommendation is based on the

record. The record here refers to the record of the Department of Justice. This record is to be distinguished from the entire file, which refers to the draft board file. Since there is no appraisal of the record and no itemization of the evidence appearing in the record of the Department of Justice, including the secret FBI report, it requires the wildest sort of speculation to say that the recommendation of the Department of Justice is not based on some undisclosed favorable evidence withheld. Neither the court nor the appellant and his counsel have any way of telling whether there was other favorable evidence in the record without seeing the FBI report, which is part of that record. Since the recommendation is based on the record and the record includes the secret FBI report, and the final appeal board classification is based on the recommendation, the undisclosed favorable evidence may contain an explanation of adverse evidence relied upon for the denial of the conscientious objector classification.

It may be argued that the issue of subpoenaing the FBI report would be irrelevant in determining whether appellant's classification by the appeal board has a basis in fact. The issue to be determined, to which the subpoena of the FBI report is relevant, is not whether there was basis in fact. The issue is whether there was a fair résumé of the favorable evidence given to the registrant.

In each of the final recommendations of the Department of Justice it is stated that all the evidence gathered on the inquiry by the FBI is summarized in the résumé. But how can we know that it is summarized unless the FBI report is compared with the résumé? The Department of Justice may have summarized only what it considered to be material and necessary to mention to the appeal board from all of the favorable evidence gathered. It was for the registrant and for the appeal board to say what was or was not favorable.

The Court cannot and must not accept the statement of the Department of Justice in the recommendation that the résumé is accurate. The trial court erroneously concluded

and so held that the résumés were entirely adequate, complete and sufficient. This holding was made by the trial court without making any reference whatever to the original FBI report. This is blind assumption on the part of the trial court. It is not the exercise of the judicial process in determining whether the summary was full and complete by comparing the résumé with the FBI report as the trial court was required to do. The holding of the trial court based on the statement of the Department of Justice in the recommendation is in effect star chamber proceedings that are odious to the Constitution and due process of law.

It should be remembered that the Department of Justice makes its recommendation upon the entire FBI report. It is not necessary for the Department to summarize in its recommendation all the favorable evidence. There may be and often is a great deal of favorable evidence that would lead the appeal board to a favorable conclusion that may never be mentioned. To argue that notice of the evidence is confined only to what appears in the recommendation is to ignore reality and greatly to curtail and limit appellant's right. He cannot be given a summary of only what is referred to by the Department of Justice. How can the appellant answer what unfavorable parts are relied on by the Department of Justice if he does not have access to all of the favorable evidence?

It may be said that appellant has at no time set forth reasons for belief that the FBI report contained additional information favorable to his claim which was not disclosed to him. The subpoena for the FBI report was not issued in the vague hope that it contains favorable evidence but so the trial court could discharge its judicial function to decide that question. This could only be determined by the trial court's seeing the FBI report.

Appellant challenges any limitation of the right to be provided with favorable information. The Government limits the right to only such favorable evidence that will thereafter be relied upon in the Department's recommenda-

tion. At the time of the hearing, how can appellant know what the appeal board will thereafter rely upon? It is the duty of the Department to provide appellant with a fair summary of all the favorable evidence in the FBI report. This right does not hinge on what has been recommended to the appeal board by the Department. A rule that would confine the providing of information only to that which appears in the recommendation to the appeal board puts the cart before the horse and places the entire matter solely in the unreachable discretion of the Department of Justice. Congress did not intend thus, because, as has been shown heretofore, Congress said that it was after the facts. How can the facts be obtained if the Department of Justice shall say what part of the facts it shall divulge?

What Congress was after in reference of the case to the Department of Justice were not opinions and speculations, but facts. See what Senator Gurney said in making known his objections to the creation of a separate conscientious objector agency, when hearings were had on Senate Bill 2655: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

Actually, what Congress was after by reference of the case to the Department of Justice were facts and circumstances that were consistent with the religious beliefs of the organization to which the conscientious objector belonged. The Government here has never attempted to turn up any fact showing that appellant has done that which is inconsistent with his religious beliefs. The facts turned up are facts inconsistent with what the Government says is a true conscientious objector. This attempt of the Government to constitute itself a hierarchy of conscientious objectors under the law is contrary to the intent of Congress. It permits the Government to discriminate, contrary to equal justice under law.

White v. United States, 215 F. 2d 782 (9th Cir. 1954), which held that the FBI report cannot be subpoenaed to

judicially determine whether all the unfavorable evidence was given to appellant in a criminal case of this kind, also laid down the proposition that the congressional intent was that the entire procedure prescribed by Section 6 (j) of the Act was for the purpose of turning up all the evidence possible to sustain the claim of the registrant. The reason being that the Department of Justice procedure is invoked only on the appeal from a denial of the conscientious objector classification.—See 215 F. 2d at pages 789-790; compare *Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

Since Congress intended that all the favorable evidence turned up by the FBI in the investigation be made available to the registrant and to the appeal board, it follows that a question of procedural due process inheres in every case where the conscientious objector claim is recommended against by the Department of Justice on whether there was a failure to make a summary of all of the favorable evidence for the registrant and the appeal board. *White v. United States*, 215 F. 2d 782 (9th Cir. 1954), therefore, supports the reasons advanced here why this Court should sustain the subpoena *duces tecum*.

It may be argued that had the production of the FBI report been compelled at the trial it would mean an inquiry into the mental processes underlying the Department's recommendation. This is a most farfetched statement. It must be admitted that *United States v. Nugent*, 346 U. S. 1, 6, required that appellant be supplied with a fair résumé of the favorable evidence. It was a question of judicial inquiry, not into the mental processes of the officers in the Department of Justice, but whether those officers had given a full and fair summary of the favorable evidence. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? Would a subpoena requiring the compulsory production of the book mean going into the mental processes underlying the author's work? Certainly not. The judicial

function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report is produced for comparison.

This certainly should answer the argument that it is anomalous to hold that a registrant is not entitled to see the report at the hearing but can see it at the criminal trial. It would not only be anomalous but ridiculous to hold that if a registrant was entitled to have a full and fair summary at the hearing he could not have the summarized document at the trial to determine whether or not it had been fairly summarized.

The Government may argue that the Department's recommendation has been superseded by the appeal board's decision. This is hardly correct. In fact it is flagrant error. Recall that the order to report is based on the appeal board decision and the appeal board decision is based on the Department's adverse recommendation. The appeal board decision is identical to the recommendation. The recommendation is similar to a general charge. The decision of the appeal board is like a general verdict. How can it be said that the recommendation (general charge) is not a part of the chain of proceedings? (*Sicurella v. United States*, 348 U. S. 385 (1955)) This case held that where the appeal board decision is based on an illegal recommendation of the Department of Justice the draft board order is illegal.

The decision of the Supreme Court in *United States v. Nugent*, 346 U. S. 1 (1953), dealt only with the contention that the complete FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of the *Nugent* decision, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a *summary* of the favorable evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the Court to do that in this case. The

Court cannot discharge the judicial function placed upon it by the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by Department of Justice Order No. 3229 (issued pursuant to 5 U. S. C. Section 22) they must be produced, because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Order No. 3229 has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. See what Mr. Justice Frankfurter said in his dissent at page 549 and what Mr. Justice Jackson declared in his dissent at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty, on the ground of mere administrative privilege without some good ground for it, is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172 (1951). That was the opinion

of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the appellant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 is sufficient to overcome the requirements of the Constitution, and "fair play." However, Order No. 3229 was issued pursuant to 5 U. S. C. § 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, 469 (1951). See concurring opinion, p. 472.

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line v. United States*, 163 F. 2d 133 (2d Cir. 1947), by Judge Clark in a concurring opinion at page 139.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States v. Andolschek*, 142 F. 2d 503 (2d Cir. 1944).

The competence of the document has been established by sources outside the document itself. Under the Act and Regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States v. Krulewitch*, 145 F. 2d 76, 79 (2d Cir. 1944)) *United States v. Beekman*, 155 F. 2d 580, 584 (2d Cir. 1946), involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error.

In *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W.D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

In *Bank Line v. United States*, 163 F. 2d 133, 138 (2d Cir. 1947), Judge Augustus Hand said:

“It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions. The existence of government privileges must be established by the party invoking them

and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual. . . .”

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951). He said:

“Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can.”—341 U. S., 172-173.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the courts and not the Department of Justice. In *Zimmerman v. Poindexter*, 74 F. Supp. 933, 935 (D. Hawaii 1947), the court said: “But the clear mandate that all executive regulations be ‘not inconsistent with law’ circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court.”

This point is further supported by the holding in *Griffin v. United States*, 183 F. 2d 990, 993 (D.C. Cir. 1950).

Attorney General Clark recognized that the question of privilege is one for the courts to decide rather than the Attorney General when he, in his Supplement Number 2, June 6, 1947, among other things, wrote:

“If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed.”

Later, however, the Attorney General instructed all United States Attorneys and all agents of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the courts for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co. v. Masland*, 244 U. S. 100, 103 (1917) said:

“ . . . if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others it will rest in the judge’s discretion to determine whether, to whom, and under what precautions the revelation should be made.”

The same rule ought to apply in the determination of the privilege urged by the Government.

Some courts that have given judicious consideration to the need for the production of the secret FBI investigative report for the purpose of determining whether or not there has been a full and fair summary made of the adverse evidence since the decision of the Supreme Court in the case of *United States v. Nugent*, 346 U. S. 1 (1953), have declared that it is necessary that the FBI report be produced at the trial. Motions to quash these subpoenas *duces tecum* by several judges have been denied.—See *United States v. Edmiston*, 118 F. Supp. 238, 240 (D. Neb. 1954); *United States v. Evans*, 115 F. Supp. 340, 343 (D. Conn.

1953); *United States v. Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States v. Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953); *United States v. Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States v. Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953; compare *White v. United States*, 215 F. 2d 782 (9th Cir. 1954); *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954); *Campbell v. United States*, 221 F. 2d 454 (4th Cir. 1955), *contra*.

The appellee may talk about congressional intent and make policy arguments which completely skirt around the real question. This calls to mind Mr. Justice Jackson's remarks in *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, 214 (1947): "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" After all the very extensive discussion by the Government it never gets around to answering the point: How can the court decide whether a full and fair summary of the favorable evidence in the FBI report that was given to the registrant? It could not answer the question without confessing that it was necessary to see the FBI report. Consequently it avoids facing the issue by talking about everything else.

The court in *Campbell v. United States*, 221 F. 2d 454 (1955), cites and quotes with approval *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954), in which case Judge Lindley also held that the FBI report could not be subpoenaed in proceedings of this kind. Since there are many errors of law in that holding by Judge Lindley that do not become manifest until the decision is considered in detail, the appellant in this case desires to analyze the opinion of Judge Lindley on the point of invalidity of the subpoena of the FBI report. While the holding in *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954), does not deal with the question of whether the subpoena could stand, if needed to determine whether a full and fair summary of the *favorable* evidence has been given, there are some statements in

the opinion that would indicate that the subpoena could not stand even for that purpose. The appellant will now, therefore, undertake an analysis of that part of *United States v. Simmons*, *supra*.

Let us consider the various so-called reasons given by the court in *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954), for the refusal to produce the FBI report. It is appellant's submission that the reasons of the court are not cogent and find no basis in law. At 213 F. 2d, p. 908, the court cites *United States v. Everngam*, 102 F. Supp. 128 (D. W.Va. 1951); *Eagles v. Samuels*, 329 U. S. 304 (1946); *United States v. Balogh*, 157 F. 2d 939 (2d Cir. 1946); *Levy v. Cain*, 149 F. 2d 338 (2d Cir. 1945); and *DeGraw v. Toon*, 151 F. 2d 778 (2d Cir. 1945). It puts these aside as inapplicable. These are authority for the proposition that procedural due process of law must be complied with in draft board proceedings. They here support the proposition that if a hearing officer refuses to give a full and fair résumé there is a violation of procedural due process of law. They did not involve the FBI subpoena point. The doctrine of these cases supports the point here, that if there has been a violation of procedural due process of law claimed by the registrant the registrant ought to be entitled to prove it in court. And how can he prove it unless he gets the FBI report produced in court so the judge can see whether a full and fair résumé was made?

The court then (213 F. 2d, p. 909) cites *United States v. Bouziden*, 108 F. Supp. 395 (W.D. Okla. 1952); and *United States v. Evans*, 115 F. Supp. 340 (D. Conn. 1953); as well as other cases by the district courts where the production of the FBI report has been sustained. The court overlooks the fact that Judge Wallace compelled the United States to produce the FBI report in the *Bouziden* case, *supra*, and in *United States v. Annett*, 108 F. Supp. 400, 404 (W.D. Okla. 1952). In one broad sweep the court says that all the other federal judges have reached their conclusions "... without analysis or evaluation." (213 F. 2d, p. 909) Those cases, it

is said, "... merely restate accepted principles of due process in selective service cases." Then the court says that the *Evans* case is "... predicated on error in at least two respects." According to the court these are (1) that the Government has the burden to prove validity of draft board proceedings and (2) that the *Nugent* case calls for a full and fair résumé.

The court states (213 F. 2d, p. 909): "If the Government must point to ... evidence which the registrant has been denied an opportunity to know and rebut, we do not doubt that the proceeding is so lacking in basic fairness as to require that the classification be declared void." The court then assumes a fact that is not so, when it says that the Government "... cannot use the F.B.I file in a criminal trial." (213 F. 2d, p. 909) The answer is that the Government can use the FBI file in a criminal trial to prove that the hearing officer either did or did not give a full and fair summary of the unfavorable evidence. This is an erroneous statement in the opinion of the court that has no support in law.—*United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944); *United States v. Krulewitch*, 145 F. 2d 76, 78-79 (2d Cir. 1944).

The court says the *Nugent* opinion is not to be read "... as requiring anything more than that evidence on which a classification order must find its support must have been called to the registrant's attention during the classification process." (213 F. 2d, p. 909) This whole argument goes around in circles. It is an argument in a vacuum. It assumes a fact not true in every case and then by such assumption reaches a false premise. Yet all the time the court keeps admitting that if a registrant is not given an opportunity to answer evidence relied upon there has been a denial of due process. But the court goes on to say: "Applying these principles, we cannot hold that appellant was denied due process of law."—213 F. 2d, p. 909.

This whole argument defeats itself and cannot be understood. The basic error on which the court reaches its

wrong conclusion is: "... the record affords a basis in fact for his classification without reference to the Justice Department's report to the appeal board. In view of this fact, we cannot say that the action of the board was arbitrary." (213 F. 2d, p. 909) This is a very specious and factitious argument. It ignores the due process problem completely. It jumps away from the procedural due process problem and attempts to hide behind the conclusion reached by the trial court, that there has been basis in fact for the denial of the conscientious objector status.

The defect in the above argument can be illustrated best by an analogy. Suppose a defendant is on trial for murder. The trial judge violates his procedural rights. The undisputed evidence shows the defendant is guilty. He appeals and claims in the appellate court there was a deprivation of due process of law on the trial. It could be argued in the appellate court (if the argument of the court is right) that, because the defendant was admittedly guilty, he was not entitled to procedural due process of law on his trial. That is exactly what the Court of Appeals did in that case. It concluded that, because there was basis in fact for the denial of the conscientious objector status aside from the Department of Justice report and recommendation, the deprivation of procedural due process of law was harmless error.

If this new foreign principle of administrative law that has been grafted onto the law of this land by the court is accepted, it means an end to reliance on violation of procedural due process of law as basis for destruction of administrative judgments. The opinion is riddled with error when it attempts to evade the necessity to produce the FBI report.

The court then assumes another fact that was never proved in that case. It assumes a factual conclusion that could never have been reached by the trial court without the production of the FBI report. After assuming this conclusion the court holds that it is unnecessary to produce

the FBI report. The court says: "Furthermore, it appears that the hearing accorded appellant conformed to those standards of procedure set forth in *Nugent* to enable the Department 'to discharge its duty to forward sound advice to the appeal board.'"—213 F. 2d, p. 909.

The court in *United States v. Simmons, supra*, admits the contention of appellant and then says: "... the test has still been met." (213 F. 2d, p. 910) It says two types of adverse evidence were in the FBI files. How did the court know what was in the files without seeing them? The hearing officer in his report relied on two points: one the mistreatment of Simmons' wife, the other, his former drinking. There was nothing in the administrative record to show that such was all the unfavorable evidence. The Department of Justice relied on the entire file, including the secret FBI report. The Attorney General in his recommendation to the appeal board did not say that was all the unfavorable evidence, nor did the hearing officer so say.

The court (213 F. 2d, p. 910) says that Simmons was questioned about his carousing. It then says: "By his own admission, he and his wife were asked questions relating to his abuse of her." This is not a correct statement. It is unsupported by the record. There is nothing in the record at the trial showing that Simmons beat his wife. Simmons testified: "Mr. West said that he had my file, and also the F.B.I. report concerning my case. He also said in the report it was reported that I was hanging around pool rooms. . . . He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine.'" Nowhere therein did the hearing officer call to Simmons' attention that he had unfavorable evidence of mistreatment of Simmons' wife.

Simmons testified: "I asked him what else was in the report. Mr. West started to tell me then about how long he had been in the law business with some large law firm here in Chicago, and that he knew all of the Justices in the Supreme Court." Now what sort of fair résumé was this?

The court said that the question asked by West, the hearing officer, of the wife of Simmons about how he was treating her, without identifying any mistreatment, was "... sufficient to inform him of all adverse evidence in the file brought to the attention of the classifying agency, the appeal board." (213 F. 2d, p. 910) This indirect way of informing a registrant of unfavorable parts without informing him of all the adverse evidence is nothing more than a "cat and mouse" treatment of the registrant that was never contemplated by even the lowest grade of due process in administrative agencies.

The whole approach the court in *Simmons* (*supra*) takes to the problem ignores completely the basic proposition that the entire secret FBI report was before the Department of Justice. The recommendation of the Assistant Attorney General may well have been influenced by contents of the secret FBI report not referred to by the hearing officer. The court has no way of knowing what other adverse evidence there was in the report that led the Assistant Attorney General to make his unfavorable recommendation. There may have been other adverse evidence relied upon that was not specified by the hearing officer. This being true, how can it be said that the hearing officer complied with the regulation and gave all the unfavorable evidence? This is an unusually speculative way of deciding a law question.

The question that the court in *Simmons* (*supra*) had before it was whether the FBI report should have been produced at the trial for the purpose of determining *whether there was a fair and complete summary given*. The Court of Appeals reached the conclusion that there was a full and fair summary because the hearing officer did not refer to any other unfavorable evidence and the testimony showed that these two items were slightly touched upon. This is reaching a conclusion without the evidence, the FBI report. The court reached a speculative conclusion that there was no unfavorable evidence in the file and thereby used that speculative conclusion as an excuse for failing to discharge

the judicial function of compelling the production of the FBI report.

The court in *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954), says that in any event "... the contents of the F.B.I. file were irrelevant to any issue before the trial court and the court did not err in quashing the subpoena." (213 F. 2d, p. 910) This is an unreasonable way to approach a judicial problem.

When the question of quashing the subpoena was before the court there was no evidence whatever before the judge as to what the contents of the draft board file were. No testimony had been taken. In other words, it required the district judge to anticipate what the testimony would be, which is impossible. The question was the error in quashing the subpoena *duces tecum* and refusing to produce the FBI report. The materiality of the FBI report must be conclusively presumed on the motion to quash, because how does the court know what the evidence is going to be? It means that the court must first try the case and then determine whether the subpoena is to be quashed. This is a most complex and scrambled way to deal with orderly judicial process. The court retried the case *de novo* and reached a finding that there was no basis in fact and there was a full and fair summary given and then determined the quashing of the subpoena was not error.

It is beyond the capacity of counsel to comprehend this type of judicial process. It is not in accordance with orderly judicial thinking. It is difficult to understand how the trial court can determine when it quashes the subpoena *duces tecum* what the evidence is going to be on the trial in response to the subpoena. This putting of the cart before the horse is a basic fallacy. It should be destroyed here.

The court in *Simmons* (*supra*) states (213 F. 2d, p. 910): "*United States v. Evans*, 115 F. Supp. 340, and the line of cases following it are not persuasive authority for requiring production of the F.B.I. file at trials of this nature, because of the basic fallacies in reasoning on which,

as we have previously pointed out, those decisions rest." After reading all the court has to say on the subject (213 F. 2d, p. 910) this Court will be unable to find one word in the opinion that even tends to approach a demonstration that there are "... basic fallacies in reasoning on which ... those decisions rest."

The court in *United States v. Simmons, supra*, builds up a condition intolerable to the Government if the FBI reports are produced by compulsory subpoena. It beats the drums of fear and anxiety for the draft board officials. It says that the drafting of manpower will be bogged down and completely stopped if the FBI reports are produced. The registrant is in court facing prison. He is not headed for the army. The drafting process is ended as far as he is concerned. Nothing could be farther from reality.

The Selective Service Regulations themselves require that all material and documents relied upon in the classification of a registrant must be included in the draft board file. (Section 1623.1) The court in *Simmons* says: "As offensive as may be the thought of the nameless, secret, hidden informer, anonymity of persons interviewed is a virtual necessity in this type of case, if the Department of Justice is to be unfettered in its appointed tasks of investigating claims of conscientious objection and of forwarding sound advice to the appeal boards." (213 F. 2d, p. 910) The plain answer to this great fear of making known the names and addresses of informants is that the court can compel the deletion of the names of informants before the FBI report is produced at the trial. This was done in *United States v. Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953).—See also *United States v. Evans*, 115 F. Supp. 340 (D. Conn. 1953).

The court says in *Simmons*: "A holding that these files must be disclosed in every case would effectively tie the hands of draft officialdom, a result which we should be hesitant to promote. (213 F. 2d, p. 910) This is a far-fetched, unreasonable, unsupported statement. Just how will due process of law in the courts where it is necessary to have

the FBI reports produced “. . . tie the hands of the draft officialdom . . . ”? The court asks, in effect: ‘Must we risk the raising of an army or must we risk judicial due process of law?’ The issue is not so terrifying. No draft board official has yet ordered the Attorney General not to produce the FBI report. It is the Attorney General who refuses to produce it. There is no draft regulation or order from the Selective Service System that prevents the FBI report from being produced. It is the Attorney General who has brought about this perplexing problem for the court.

The Department of Justice by its misconduct in withholding the FBI report, aided by the district judge’s quashing the subpoena calling for the FBI report, is the cause of the trouble and certainly it must be considered that to allow due process of law in a Selective Service case does not mean a breakdown of the armed forces of the United States.

The court in *United States v. Simmons*, *supra*, did not approach the problem with the same fearlessness that Judge Hand in the Second Circuit did in *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944); and *United States v. Krulewitch*, 145 F. 2d 76, 78-79 (2d Cir. 1944). See *United States v. Reynolds*, 345 U. S. 1, 12 (1953). Those cases held that if the Government wanted to keep the FBI reports secret they should not prosecute where the reports become material, as here. And that seems to be a complete answer to the position taken by the Department of Justice in this case.

The Government may cite to the Court *Williams v. New York*, 337 U. S. 241 (1949). That case involved the right of the judge to conceal confidential evidence about a murderer on a pre-sentence investigation. The defendant in the case was a gangster. He was given the death sentence on the undisclosed information in the pre-sentence investigation. Where the court has to deal with one who has accessories and friendly hardened criminals, it is often neces-

sary to protect the informants against reprisal. In such a situation, there is every reason for the nondisclosure. Protecting the informant protects his life, perhaps. A revelation of the name of the informant may spell death to him.

No such danger or any possibility of reprisal exists to the informants providing evidence adverse to conscientious objectors. There is no greater danger to an informant in a conscientious objector case than there would be in any other administrative law proceeding such as proceedings involving labor relations, rate making and deportation cases. What is there so dangerous about a conscientious objector that puts informants testifying about him in the same category as informants whose names appear in a pre-sentence investigation in murder cases? There is no similarity between the two. The use of *Williams v. New York*, 337 U. S. 241 (1949), has no place in this case. The holding should be put aside.

Another strong reason exists why the holding in *Williams v. New York*, 337 U. S. 241 (1949), is inappropriate. That case dealt with a subject matter clearly different from a determination. The trial had been held. The guilt of the defendant had already been fixed. The matter of judgment and sentence was something entirely in the discrimination of the judge. The sentencing of a defendant in a criminal case is an act of executing judgment. It involves an exercise of broad discretion on the part of the trial judge. He can consider matters that are inadmissible at the trial. He can hear pleas in mitigation. He can go into the entire background and life of the defendant. The hearing at a sentence and the consideration of the pre-sentence investigation are matters entirely in the discrimination of the judge. It is different from the trial procedure.

Had the withholding of the information in the pre-sentence investigation in the *Williams* case been evidence which the court considered at the trial and were such evidence considered in camera and not divulged to the defend-

ant, then an entirely different situation would have been presented. No court would let a judgment stand where secret evidence had been considered by the court in arriving at a finding of guilt.

The inquiry and hearing conducted by the Department of Justice were for the purpose of turning up evidence to the appeal board to make the determination of whether or not the benefits granted to the conscientious objector status shall or shall not be granted to the particular registrant. It involves a determination of justice, just like a finding of guilt or innocence involves a determination of justice. The situation here is analogous to the secret consideration of evidence withheld at a trial. It is not at all like the consideration of the pre-sentence investigation report.

Another strong reason, therefore, exists why the *Williams* case is out of place in this case. It is that the extent of punishment assessed is never a question for the appellate courts as long as it is within the law. When a sentence imposed is within the law, it can never be questioned. Anything relating to the punishment (within the law) is entirely immaterial and may not be considered.

The investigation of conscientious objector claims by the Department of Justice is not a part of the criminal investigation process by the department. Mr. Joseph C. Duggan, former Assistant Attorney General in charge of the division in the department conducting the investigations, said that the investigations were "by a division in the Department separate and distinct from that charged with enforcement of the penal sanctions of the Act." (*The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, Washington, Catholic University of American Press, 1946, page 113, footnote 111) It is plain that the investigation, therefore, is not of a criminal type. The informants, accordingly, are not criminal informants.

Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir.) affirmed 341 U. S. 918 (1951), which may be relied on by the Govern-

ment is not in point. The case involved a government employee. She was subject to discharge by the government without consideration, reason or notice. The points of distinction between the cases and *Bailey v. Richardson, supra*, are: (1) there was no provision for a hearing made in the case, (2) there was no question of personal liberty involved and there was no chance of a jail sentence, and (3) the information dealt with in the *Bailey* case concerned security information. There is, accordingly, not the slightest similarity between the *Bailey* case and this case. It is distinguishable. It should be put aside as having no bearing on the question involved.

Escoe v. Zerbst, 295 U. S. 490 (1935), is in point. It did not involve a determination. The only point for consideration was the revocation of probation. The Supreme Court held that probation was an act of grace. It said that it could be coupled with such conditions as Congress may impose. The Government argued that the district judge who revoked probation under the statute without notice was within his rights. The Court said:

“But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. (*French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702) The revocation is invalid unless the command has been obeyed.

“ . . . We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement.”

This case is closer to the *Joint Anti-Fascist Refugee Committee* case (341 U.S. 123 (1951)) than it is to the *Norwegian Nitrogen Case* (288 U.S. 294 (1933)). In the *Joint Anti-Fascist Refugee Committee* case there was involved an executive order that provided only for an investigation and appropriate determination. There was no requirement of a hearing. The procedure was not prescribed by the statute as here. It was devised by the president under Executive Order 9835. Even in the absence of a statutory provision for hearing, the Supreme Court held that it was unlawful to withhold the secret investigative report.

It may be argued that because the conscientious objector status is a privilege and not a right it is not necessary to follow due process. While the status is a privilege granted by Congress, it does not mean that the constitutional rights of the registrant to a full and fair hearing guaranteed by the due process clause of the Fifth Amendment can be forfeited and taken away from him.

This same kind of argument was made by the Government in *Estep v. United States*, 327 U.S. 114 (1946). It argued that the defense could not be made by Estep. The Supreme Court rejected the argument that merely because exemption and deferment were privileges the constitutional rights of the registrant to procedural due process of law could be violated. The limited defense permitted in the *Estep* case also makes the validity of the draft board proceedings dependent upon a very strict compliance with the principles of fair play. This means that a full and fair hearing in the Department of Justice as well as in Selective Service System must be accorded.—*Estep v. United States*, 327 U.S. 114 (1946).

If the lack of the constitutional right to exemption did not permit a denial of a full and fair judicial hearing in the courts called upon to prosecute cases under the act, then why may the Department of Justice claim that it does not have to abide by due process in this case?

It is well known that practically every administrative agency of the federal government operates in fields that are not covered by the Constitution as far as the substantive right to operate in the field is concerned. The courts have, nevertheless, required the administrative agencies carrying out the governmental regulations in the field to abide by the standards of procedural due process in administering the regulatory power of the Government. The courts have repeatedly held that the administrative agencies are subject to the restraints of the due process clause of the Fifth Amendment. It has always been held that the due process clause reaches administrative agencies.—Vom Baur, *Federal Administrative Law*, § 297, p. 302, Chicago, Callaghan & Company, 1942.

At an early date it was held that the right to enter this country as an alien was not a right guaranteed by the Constitution. It was held to be a statutory privilege that could be determined by administrative agency, whose determination was final. The situation is identical to that involved here. In *The Japanese Immigrant Case*, 189 U. S. 86 (1903), it was argued by the Government that because there was no constitutional right but only a statutory privilege or grant involved the procedural due process requirements of the Fifth Amendment could not be resorted to by the immigrant. While the exclusion order was not disturbed and the dismissal of the habeas corpus petition was sustained, the Supreme Court took occasion to reject the argument of the Government that the due process clause did not reach the orders of Commissioner of Immigration. In that case it was said that—"this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard,

before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.”—189 U. S. 86, at pp. 100-101.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States v. Ju Toy*, 198 U. S. 253, 263 (1905)) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92 (1913)) The Supreme Court has held that where a statute provides for an administrative hearing the due process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 182 (1938).

Professor Wigmore in his great work on *Evidence*, in Volume 1, section 4 (b), page 34, says: “The Federal Supreme Court has occasionally (ante sec. 4a) pointed out what it considers to be the essentials of a fair trial of fact by administrative officials—the opportunity to call witnesses, the opportunity to hear the evidence on the other side, and so on. But these casual designations do not cover even the fundamentals of a simple system of proof.”—See also *Dismuke v. United States*, 297 U. S. 167, at p. 171 (1936).

Even though the records sought by the subpoena are claimed to be confidential by the Attorney General’s Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictments questioned by the registrants.

The only time that the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950). But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

“ . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . ”

Mr. Justice Jackson in his dissent wrote:

“Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in the procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Cf. *In re Oliver*, 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American

citizen without notice of charges, evidence of guilt and a chance to meet it.”—338 U. S. at pages 551-552.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, at 469 (1951):

“ . . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General’s exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske v. Comingore*, 177 U.S. 459.”

In a concurring opinion, Mr. Justice Frankfurter said at page 472: “There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers.”

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might effect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line v. United States*, 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139: “ . . . but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces . . . ”

Order No. 3229, on the other hand, has a provision which would seem to allow disclosure of the FBI report to a registrant. That provision does not allow disclosure of the report "for any purpose other than for the performance of his official duties." This would allow disclosure of the FBI report to the registrant because the investigation is made for the hearing before the Department of Justice, at which the registrant is entitled to an opportunity to be heard. The reasons are: (1) it was in the performance of official duty by the hearing officer, and (2) his official duties to both the registrant and the appeal board could not be performed without disclosing all the evidence that he had before him, including the secret FBI report.

The Supreme Court has even held that an informer of law violations may be identified under certain conditions. See *Scher v. United States*, 305 U. S. 251 at page 254 (1938): "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Segurolo v. U.S.*, 1 Cir., 16 F. 2d 563, 565; *Shore v. U. S.*, 60 App. D. C. 137, 49 F. 2d 519, 522; *McInes v. U. S.*, 9 Cir., 62 F. 2d 180."

The FBI report may be said to be immaterial to any issue. This is not so. The materiality is established by *United States v. Nugent*, 346 U. S. 1, 6 (1953); and *United States v. Evans*, 115 F. Supp. 340, 343 (D. Conn. 1953). There was a duty on the trial court to determine whether what was said by the hearing officer to appellant constituted a full and fair résumé of the unfavorable evidence. Even if the hearing officer mentioned nothing about adverse evidence or said there was none it still would be the duty of the trial court to see for itself whether there was a need to give a summary and to what extent the summary should be made. In *United States v. Packer*, 200 F. 2d 540, 542 (1952) (reversed on other grounds at 346 U. S. 1 (1953)), the Court of Appeals for the Second Circuit said: "It is true that in the case at bar the defendant was told that the F.B.I. report

was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

The judicial function of the trial court cannot be determined until the FBI report is produced. It could not be produced, because the subpoena had been quashed. The trial court could not determine, and the Government is not entitled to argue here, that it was not material or admissible unless and until it saw the FBI report. Since the trial court took steps to prevent itself from being able to perform the judicial function by quashing the subpoena the case should be reversed.

How can it be said that the FBI report is not material when the trial court did not even make an inspection *in camera*? What authority does the Government have to assert to this Court that the FBI report is not material, when the document has been kept out of the record? How can this Court decide the question without seeing the FBI report? Must this Court speculate in favor of the erroneous holding of the court below and the obdurate Government that hides the FBI report from this Court? Is this Court at the mercy of the Government? The mere asking of the questions reverberates the answer to all: No! Yet that is exactly the position the judicial process of the Court is placed in by the ruling of the court below and the position taken by the Government on this issue in this case.

The position taken by the appellant on this point is sustained by *Gordon v. United States*, 344 U. S. 414, 418-420 (1953). In that case Mr. Justice Jackson stated:

"We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly

exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.”—344 U. S. 414, 420.

While the trial court did not find the FBI report material and mark it for identification the order quashing the subpoena in effect amounted to a finding of materiality by the trial court. For the purpose of determining whether the FBI report was subject to subpoena it must be conclusively presumed that it was material. By quashing the subpoena the trial court made it impossible for the FBI report to be produced for an inspection or examination *in camera* as to its materiality. This circumstance results in a conclusive presumption on the record in this case that it was material. The trial court in quashing the subpoena made it impossible for it to go as far as it was required to go under *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952).

The Government may take the position that it was necessary to call the witnesses subpoenaed and demand that the FBI report be produced. It was not necessary to do this. The witnesses were no longer under compulsion to produce the FBI report after the subpoena was quashed. The trial court had ruled the FBI report out. The trial counsel for appellant was merely complying with the order of the court quashing the subpoena. Had the counsel for the appellant demanded the FBI report or called the witnesses for this purpose, in the face of the ruling of that trial court previously made quashing the subpoena, it would have been treated perhaps as contempt or, at least, counsel would be subject to censure. Surely counsel is not required to go so far when a subpoena has been quashed. It has never been held that an assignment of error in quash-

ing a subpoena is waived unless the witness is called and the evidence attempted to be obtained. The courts have not stretched the procedural requirements that far.

Any argument made by the Government that the point is not ripe for decision here because appellant failed to call for the FBI report at the trial and make it part of the record on his appeal should be rejected. The Court can and should take judicial notice of the Order of the Attorney General that was in existence at the time of the trial of this case. It prohibited the United States Attorney from producing the report to the trial court even for inspection *in camera*. See Department of Justice Order No. 3229, revised by the Attorney General on January 13, 1953, revoking previous amendments of the order dated May 2, 1939, December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether the privilege outweighed the materiality of the document. Since the United States Attorney was under legal compulsion not to produce it to the court for purposes of completing the record, how can it be said that appellant failed to attempt to get it? Appellant cannot be required to go through an idle and vain gesture.

United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion, at p. 467.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2, pp. 463-464.) It is the validity of the order, as construed and applied to the particular facts, with which the Court is here concerned.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light*

and *Power Company v. Nashville Coal Company*, 55 F. Supp. 65 (W.D. Ky. 1944).

The criminal cases relied upon by the appellant in this case (*United States v. Andolschek*, 142 F. 2d 503 (2d Cir., 1944) and *United States v. Beckman*, 155 F. 2d 580 (2d Cir., 1946)) are, like the case at bar, distinguished for the reasons stated by the Court in *United States v. Reynolds*, 345 U. S. 1, 12 (1953). Please read the last paragraph of the majority opinion in that case.

It is respectfully submitted that the district court committed reversible error when it quashed the subpoena *duces tecum* calling for the production of the secret FBI investigative report. Appellant was prevented from even offering the document into evidence at the trial. The document was relevant for the purpose of determining whether the hearing officer gave appellant a full and fair summary of the favorable evidence appearing in the secret FBI investigative report. No legal or justifiable basis exists for the trial court's ruling quashing the subpoena.

The judgment of the court below should be reversed and the cause remanded to the district court for a new trial because of this error.

CONCLUSION

The judgment of the court below should be reversed because the trial court committed reversible error—

- (1) In denying the motion for judgment of acquittal because
 - (a) There was no basis in fact for the denial of the full conscientious objector status, thus making the final I-A-O classification arbitrary and capricious;
 - (b) The I-A-O classification is on its face arbitrary and capricious because nowhere does it appear that appellant was a conscientious objector to only combatant military training and service;

- (c) The recommendation of the Department of Justice that appellant should be denied the conscientious objector status was illegal, arbitrary and capricious so as to deny appellant a full and fair hearing before the appeal board; and
- (2) In sustaining the motion to quash the subpoena duces tecum, thus denying the trial court and the appellant of the only means of testing whether the Department of Justice supplied to appellant and to the appeal board a full and fair summary of all of the favorable evidence appearing in the FBI report.

WHEREFORE, the appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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September, 1957.

APPENDIX A

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APPENDIX B

CRIMINAL CODE AMENDMENT

Public Law 85-269
85th Congress, S. 2377
September 2, 1957

AN ACT

To amend chapter 223, title 18, United States Code, to provide for the production of statements and reports of witnesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

“§ 3500. Demands for production of statements and reports of witnesses

“(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of sub-

pena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

“(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

“(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

“(d) If the United States elects not to comply with an

order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

“(e) The term ‘statement’, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

“(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

“(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.”

The analysis of such chapter is amended by adding at the end thereof the following:

“3500. Demands for production of statements and reports of witnesses.”

Approved September 2, 1957.

No. 15647

United States Court of Appeals
FOR THE NINTH CIRCUIT

JERRY KEITH ROGERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

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FILED

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No. 15647

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Appeal from the United States District Court for the
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MAY IT PLEASE THE COURT:

Only one point of the brief for the appellee needs to be answered. That is Point Two at pages 18-20. There the appellee relies primarily upon *White v. United States*, 215 F. 2d 782 (9th Cir. 1954) (cert. denied 348 U. S. 970 (1955)), and *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957).

The ruling of the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), denying the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board,

is out of harmony with *Jencks v. United States*, 353 U. S. 657, 671 (1957). There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. In *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), as here, the summary of the FBI report was a "witness" against the appellant in the appeal board. In the trial court, as a basis for acquittal, the appellant in this case contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U. S. C. App. § 451 (c)) provides for "a system of selection which is fair and just." The Act says:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) Stat. 75.

Appellant to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the FBI report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the appellant was entitled by procedural due process of law in the district court to

attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call his "witness" (the FBI report), by the order excluding evidence.

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1955); and *Sicurella v. United States*, 348 U.S. 385 (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting appellant's conscientious objector claims. This is through making an incomplete or inaccurate summary of the original FBI reports, suggested in *United States v. Nugent*, 346 U.S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries thereof.

Even the United States Court of Appeals for the Fourth Circuit admitted this by a statement made in its opinion in the *Blalock* case. (247 F. 2d 615, at page 620) The Court said: "Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize." The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is

full and fair without reading the book? The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report, which was summarized, is produced for comparison.

A question similar to that presented here was submitted to the Court in *Simmons v. United States*, 348 U. S. 397 (1955). Read what the Court said in the last paragraph of that opinion. (348 U. S. at page 406) It was presented to the Court in other cases. See footnote 3 of the opinion of the court in *Blalock v. United States*, 247 F. 2d at page 621, (4th Cir. 1957). The denial of certiorari in those cases is insignificant. *United States v. Carver*, 260 U. S. 482, 490 (1923); compare special concurring opinion of Mr. Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U. S. 912 (1950).

In *Simmons v. United States*, No. 251, October Term, 1954, at page 17 of the Memorandum of the United States in Opposition, Judge Sobeloff, now of the Court of Appeals for the Fourth Circuit (then Solicitor General) told the Supreme Court of the United States: "However if the Court does not deem this issue determined by *Nugent*, we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal."¹ Since the date of the decision in *Jencks v. United States*, 353 U. S. 657 (June 3, 1957) (and before the opinion of the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957)) the United States District Court for the Western District of Washington in *United States v. Jacobson*, 154

¹ See the district court opinions: *United States v. Edmiston*, 118 F. Supp. 238, 240 (D. Neb. 1954); *United States v. Evans*, 115 F. Supp. 340, 343 (D. Conn. 1953); *United States v. Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States v. Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953); *United States v. Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States v. Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953.

F. Supp. 103 (1957), decided the identical issue present here in conflict with the decision of the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957).

Generally the same cases cited by the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), in footnote 3 of its opinion may be distinguished. This is because they involved an attempt to subpoena the FBI report for the purpose of showing that adverse evidence against the registrant was withheld at the hearing in the Department of Justice. The reason they are distinguishable is that here the FBI reports are needed to determine whether favorable evidence has been withheld from the appeal board. In the cases referred to by the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), involving the withholding of unfavorable evidence at a hearing, it may be said the situation is different from the case here where favorable evidence is held back.² It may also be said, but not admitted, that the registrant is not unduly harmed in the administrative proceedings by withholding unfavorable evidence at the Department of Justice hearing. The reason may be that the written summary of the unfavorable evidence is all that reaches the appeal board and the registrant has the right to answer that before the appeal board. (*Gonzales v. United States*, 348 U. S. 407 (1955)) He has no way, however, of overcoming the prejudice done by holding back and not making known to him and to the appeal board of the favorable evidence.

Appellant suggests that it may be that the reason the petition for writ of certiorari was denied in *White v. United States*, 348 U. S. 970 (1955), after the statement made in the last paragraph of the opinion in *Simmons v. United States*, 348 U. S. 397, 406 (1955), was that the procedure established that day in *Gonzales v. United States*, 348 U. S. 407 (1955), would thereafter prevent the question from again arising or would be a sufficient

² Appellant does not admit that the holdings by the courts of appeals cited in footnote 3 of the *Blalock* opinion are correct.

guarantee against the denial of due process in cases involving unfavorable evidence not given to the registrant at the Department of Justice hearing.

The denial of certiorari in *White v. United States*, 215 F. 2d 782 (9th Cir. 1954), cert. denied, 348 U.S. 970 (1955), may have been based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States v. Nugent*, 346 U.S. 1 (1953), with *Gonzales v. United States*, 348 U.S. 407 (1955). The question decided in *White v. United States*, 215 F. 2d 782 (9th Cir. 1954), cert. denied 348 U.S. 970 (1955), was presented to the Court but not decided in *Simmons v. United States*, 348 U.S. 397, 406 (1955).

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrants may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although appellant does not concede this since the question is still open in the Court. See *Simmons v. United States*, 348 U.S. 397 (1955), and *Gonzales v. United States*, 348 U.S. 407 (1955). But in the case of

withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government and by the courts of appeals for not producing the FBI reports at the trials where the only question involved the use of unfavorable evidence.—*Campbell v. United States*, 221 F. 2d 454 (4th Cir. 1955); *United States v. Simmons*, 213 F. 2d 901 (7th Cir. 1954) (reversed on other grounds, 348 U. S. 397 (1955)).

The court below grounded its decision in this case upon *United States v. Nugent*, 346 U. S. 1 (1953). That decision gives no support for the holding in this case. *Nugent* involved only the question of whether all the adverse evidence in the FBI report should be given to the registrant during the administrative proceedings by submitting the original report to him. The Court held that giving a summary of the adverse evidence was sufficient. The question of whether the defendants in that case had the right to subpoena the FBI report at the trial was not determined, although it was raised in the brief filed in the Supreme Court.

Appellant is not here making a complaint that the original FBI report was not given to him in the administrative proceedings. He says that the summary of the report was inadequate and thus favorable evidence was withheld from the appeal board denying procedural due process and that the FBI report is material to determine that point. The *Nugent* case (346 U. S. 1) did not decide whether the FBI reports could be subpoenaed in the trial court for the purpose of testing the résumés made to the appeal board. No such résumé was even made in the *Nugent* case. That question was also undecided in that case, the same as it was in *Simmons v. United States*, 348 U. S. 397, 406 (1955).

Since the question was not decided by the Court in *Nugent* (346 U. S. 1 (1953)), then how can the court of

appeals in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), amend the decision of the Court in *Nugent* (346 U. S. 1 (1953)) by saying that it was decided? The very fact that the decision of the court in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957), is based upon a nonexistent holding by the Supreme Court in *United States v. Nugent*, 346 U. S. 1 (1953), should guide this Court in refusing to follow the decision in *Blalock v. United States*, 247 F. 2d 615 (4th Cir. 1957). Consider the last two paragraphs of the opinion in the *Blalock* case, where the court indicates its extreme uncertainty about its holding.

It is submitted that the judgment of the court below should be reversed because (1) the decision of the court below is in direct conflict with *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), and (2) the decision below also is out of accord with *Jencks v. United States*, 353 U. S. 657 (1957).

CONCLUSION

WHEREFORE, for the reasons above stated, as well as those set forth in appellant's main brief, appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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November, 1957.

**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

JERRY KEITH ROGERS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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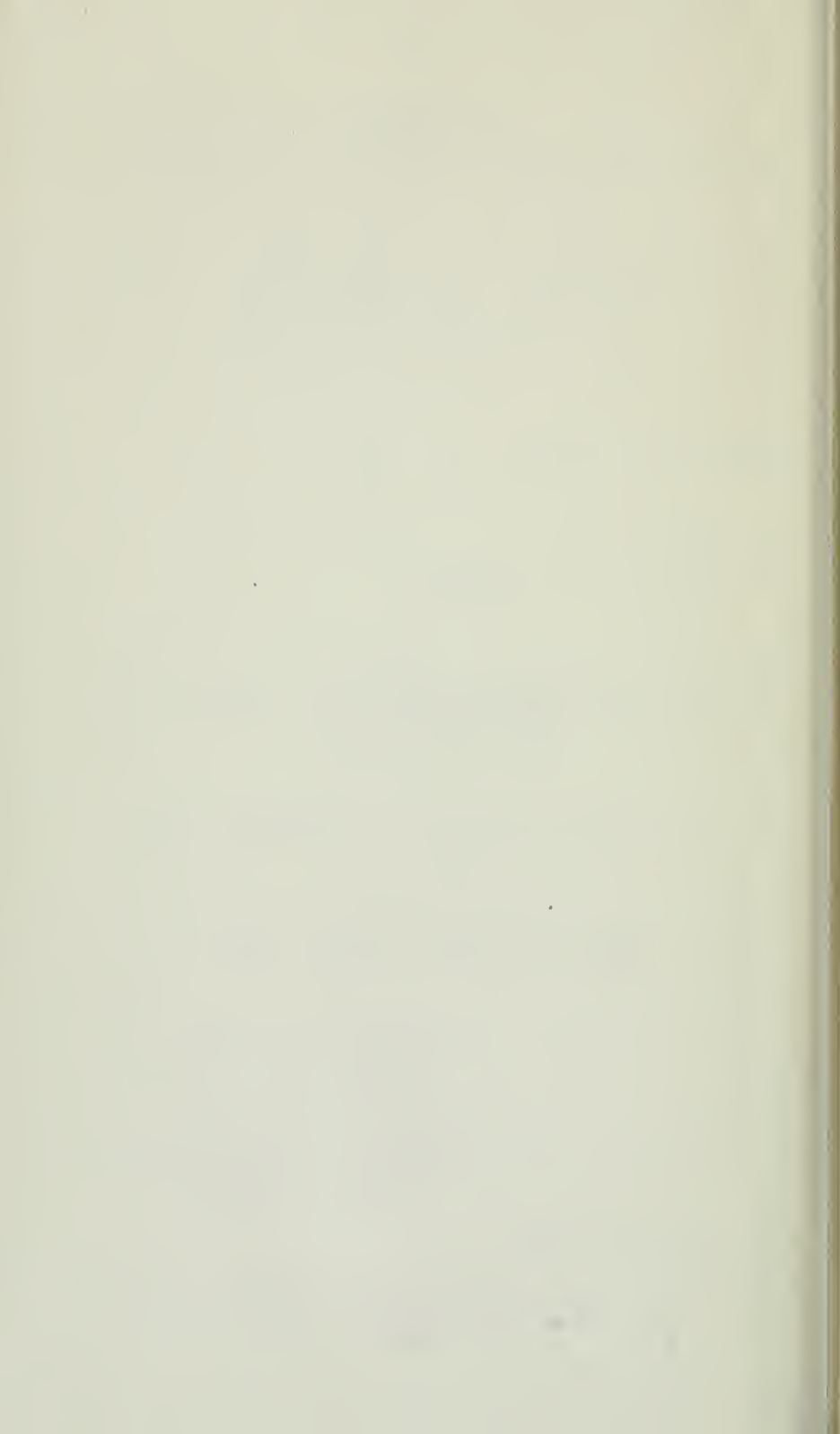
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF FOR APPELLEE

I. JURISDICTION

This is an appeal from a conviction in the United States District Court for the Western District of Washington, Northern Division, of an offense under the Universal Military Training and Service Act, Title 50 U.S.C. Appendix § 462. The District Court had

jurisdiction under Title 18 U.S.C. § 3231. This Court has jurisdiction of this appeal by reason of the provisions of Title 18 U.S.C. § 3772 and Rule 37 of the Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

Appellant was convicted of willfully refusing to submit to induction in the armed forces of the United States. He admits the refusal but denies that he was classified for induction in accord with due process of law. He also claims that the court below should be reversed because it did not cause Federal Bureau of Investigation reports to be produced and used at the trial.

In this brief references to the copy of the Selective Service file which is submitted as the only exhibit will be followed by "Ex." and the page number. That page number of the exhibit will be the handwritten figure which appears at the lower right corner of each of the papers in it.

Appellant registered with the Selective Service System on October 17, 1951 (Ex. 95). He stated that he was a regularly serving minister of religion (Ex. 97). On November 13, 1951, he filed a special form for conscientious objectors in which he stated among other things that "the only force I believe in is

immediate protection of myself and my friends, and that force which is commanded by God" (Ex. 85, 86).

Appellant appeared before his local draft board on December 11, 1951. A brief record of that appearance was made. It shows that he was queried as to whether he would protect himself if the country was invaded and gave the response, "will not . . . I would not kill." That record further shows that the board determined that it had not been convinced that registrant was a conscientious objector and he was therefore classified 1-A (Ex. 84).

The minutes of actions by local and appeal boards (Ex. 102) shows an additional entry regarding the December 11, 1951, personal appearance of the appellant. It indicates that the registrant requested a 1-O classification, which was denied because he was unable to convince the board that he qualified for such classification (Ex. 102). He was classified 1-A by a board vote of 2-0 and filed an administrative appeal. The classification was affirmed by unanimous vote of the Appeal Board (Ex. 102).

The Selective Service file was then referred to the Department of Justice for advisory opinion, pursuant to Section 6(j) of the Act (50 U.S.C. App. § 456(j)). (Ex. 76-77). The registrant was accorded a hearing before a Special Hearing Officer of the Department

of Justice. At that hearing appellant stated that he could not conscientiously perform noncombatant training and services in the armed forces of the United States because that would interfere with his religious activity and because the teachings of his religion required that he should remain unspotted from the world. The hearing officer recommended classification 1-A-O. The Department of Justice concurred in that recommendation and so advised the Appeal Board (Ex. 62-63).

The Appeal Board reconsidered the case after receiving the Department of Justice recommendation and several affidavits filed by the appellant. By unanimous vote it reclassified the appellant to Class 1-A-O (Ex. 63-73, 102).

The registrant was then requested to appear before his Local Board and made such an appearance on October 12, 1954. He was orally asked certain questions. The questions and answers were reduced to writing and signed by him after the interview. They showed that appellant was opposed to the use of force to protect his country but believed that force could be used to protect his home, his friends, his religious brethren, and that armed force was proper to defend his family. He stated that his conscientious objection was based primarily on his desire to preach and that

he was not willing to perform civilian work in the national interest for a period of twenty-four months because "The Bible says we shall not become friends of the World. Friendship with the World is enmity with God" (Ex. 54). The Local Board did not change the classification as a result of this interview (Ex. 102).

Classification of the registrant was reconsidered by his Local Board on April 19, 1955, because of a change in the regulations. The board again classified him, by a 2-0 vote, in Class 1-A-O (Ex. 102). He did not appeal from that classification or request a further oral interview with the board, but an appeal was taken by the Government appeal agent (Ex. 102).

The matter was again referred to the Department of Justice for the special hearing required by the Act and appellant ultimately appeared before another hearing officer of the Department of Justice. That second hearing officer also recommended classification as 1-A-O (Ex. 36). The Department of Justice again recommended to the Appeal Board that the classification be 1-A-O (Ex. 35-37).

While the matter was being considered by the Department of Justice appellant submitted information concerning the dependency of his mother but the Local

Board determined that such information did not warrant a change in classification (Ex. 40).

All of the information above referred to was available to the Appeal Board on June 19, 1956 when it made the final classification. In addition, it had a letter from the registrant under date of June 11, 1956, reading in part as follows:

“My claim for exemption as a Conscientious Objector is based solely on the fact that I am a regularly ordained minister of the Gospel.”
(Ex. 32).

III. SUMMARY OF ARGUMENT

Appellant had the burden of establishing to the satisfaction of the draft officials that he was conscientiously opposed on religious grounds to noncombatant service in the armed forces of the United States. He failed to sustain that burden. On the contrary, in proceedings lasting approximately five years and involving hearings before two Special Hearing Officers of the Department of Justice, recommendations of other agents of the Department of Justice, appearances before his Local Board, and repeated votes of the members of his Local Board and of the Appeal Board, he was unable to persuade any one of those officials that he did have such conscientious objection to noncombatant service.

The classification did not deprive appellant of due process of law and may not be reviewed in the courts.

The court below quashed a subpoena duces tecum which would have required the production of confidential Federal Bureau of Investigation reports for use at the trial. The court was correct because the confidential reports of the Federal Bureau of Investigation have a special status in conscientious objector cases. They are replaced for all purposes in connection with the classification of alleged conscientious objectors by the summaries mandated by the decision of the Supreme Court in *United States v. Nugent*, 346 U.S. 1 (1953).

IV. ARGUMENT

POINT ONE

THE CLASSIFICATION BY THE APPEAL BOARD WAS PROPER AND NOT SUBJECT TO REVIEW

Section 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 451), provides in part that:

“... an adequate armed strength must be achieved and maintained to insure the security of this Nation

* * * * *

“that in a free society the obligations and privileges of serving in the armed forces and the re-

serve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 4(a) of the Act (50 U.S.C. App. § 454(a)), with certain very limited exceptions, makes liable for training and service in the armed forces of the United States every male person within certain age groups who is a citizen of the United States and every male alien admitted for permanent residence in the United States.

In view of the universal nature of the obligation to perform military service, only those persons would be placed in exempt or deferred classifications who clearly belong in those classifications. This was recognized by the President of the United States when, in accordance with Section 10(b)(1) of the Act (50 U.S.C. App. § 460), he prescribed the Selective Service Regulations.

Section 1622.10 of the Selective Service Regulations (32 C.F.R. § 1622.10), provides:

"Class 1-A: Available for military service. In Class 1-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class."

Section 1622.1(c) of those Regulations (32 C.F.R. 1622.1(c)) contains the following sentence:

“Each registrant will be considered as available for military service *until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board.*” (Emphasis supplied.)

See also, Section 1623.2 of the Regulations (32 C.F.R. 1623.2) in which it is stated:

“Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed * * *.”

Section 10 (b) (3) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 460 (b) (3)), authorizes the President of the United States to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered, together with such other duties as may be assigned. It is further provided in the same section:

“Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President,

have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. *The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * * The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President.*" (Emphasis supplied.)

With respect to the above language, the Supreme Court of the United States in the case of *Dickinson v. United States*, 346 U.S. 389, 394, (1953) said:

"At the outset it is important to underline an elemental feature of this case. The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders. Rather the Act provides, as did the 1917 and 1940 Conscription Acts before it, that classification orders by selective service authority shall be 'final'. However, in *Estep v. United States*, 327 U.S. 114, (1946), a case arising under the 1940 Act, this Court said, at 122-123: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The

question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant'."

In *Cox v. United States*, 332 U.S. 442, 453, (1947) the Supreme Court stated:

"Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable 'only if there is no basis in fact for the classification.' *Estep v. United States*, *supra*, 122. Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders."

In the case of *Swaczyk v. United States*, 156 F. 2d 17, 19 (1st Cir. 1946), cert. denied 329 U.S. 726, it was stated:

" 'It should be remembered that immunity from military service arises not as a matter of constitutional grant, but by virtue of Congressional deference to conscientious religious views. *Rase v. United States*, 6 Cir., 129 F. 2d 204. The burden, therefore, is not upon the government, but upon one claiming exemption to bring himself clearly within the excepted class.' *Seele v. United States*, 8 Cir., 133 F. 2d 1015, at page 1022.

"Unless, then, the registrant can establish the complete lack of a factual basis for his classification, or, perhaps, some controlling bias or prejudice against him, his defense is ineffectual"

The jurisdictional requirement of a basis in fact for the determination by the Appeal Board is a vastly different thing than the usual substantial evidence standard applied to administrative decisions. The draft board, by the necessities of the situation, must read the registrant's mind.

Anything giving a fair clue to the registrant's true state of mind constitutes a basis in fact.

White v. United States, 215 F. 2d 782 (9th Cir. 1954);

Tomlinson v. United States, 216 F. 2d, 12 (9th Cir. 1954).

In *Tomlinson*, this Court stated in part, at page 17, as follows:

"We note here that the board found that registrant was in fact a conscientious objector. It is evident that the board raised the question: conscientious objector to what? In *White v. United States*, supra, this court had occasion to point out that a draft board having to do with a claim of conscientious objection, is necessarily called upon to evaluate a mental attitude and a belief. A board or body called upon to determine to what extent and how far an individual's conscientious objections go, may well have great difficulty in coming to a conclusion. Surely the board is not concluded by the mere assertion of the registrant. Attitudes and demeanors which develop at the time of such a person's personal appearance may well be the controlling factors. In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing

officer. Such a report may furnish the basis in fact which supports the board's action. *Kent v. United States*, 9 Cir., 207 F. 2d 234, 237; *Rober-son v. United States*, 10 Cir., 208 F. 2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

This Court in the *Tomlinson* case went on to state, page 18, as follows:

"The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs 'of this world'. True he is conscientiously opposed to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying the 'message' and doing what he chose to call 'ministerial work'. * * * An objection, on religious grounds, to any assignment which would take the registrant away from his missionary activities, is not an objection which the Act recognizes."

It will be noted from the *Tomlinson* and *White* cases referred to above that the Department of Justice recommendations of themselves would constitute a basis in fact to support the classification given this appellant. Two different Department of Justice Hearing Officers made findings on the basis of the entire record including personal observation of the appellant. The respective Hearing Officers concluded that while the appellant is conscientiously opposed to war in any form which involves the taking of human life, that his conscientious objections with respect to noncombatant

training and service is not based upon religious training and belief. One Hearing Officer pointed out that while registrant based his contention that he was a conscientious objector on his abhorrence of killing another human being, he did not claim that the Jehovah's Witness sect taught its members to be conscientious objectors or that there was any rule in that respect. (Jehovah's Witnesses are not necessarily conscientious objectors. Some Jehovah's Witnesses have joined the Army and Navy. Each must make the determination according to his own conscience. See *Gonzales v. United States*, 212 F. 2d 71, (6th Cir. 1954) reversed on other grounds 348 U.S. 407). The Department of Justice recommendation dated August 19, 1954, points out that the appellant stated that he principally relied upon the Commandment "Thou Shalt Not Kill" as a basis for his objection to war and the teaching of the Bible to "Love Thy Neighbor As Thyself". The second Department of Justice recommendation dated May 18, 1956, points out that the appellant's statement to the first Hearing Officer that he was conscientiously opposed to non-combatant military training and service was because it would interfere with his ministerial and preaching work.

Registrant confirmed that fact to the Appeal Board just eight days before his final classification

was fixed. In a letter dated June 11, 1956, he stated to the Appeal Board:

“My claim for exemption as a conscientious objector is based solely on the fact that I am a regularly ordained Minister of the Gospel.”

As this Court held in *Tomlinson v. United States*, *supra*, the Act does not exempt a registrant from military service because such service would interfere with the ministerial work of a person who is not entitled to exemption from military service because of status as the leader of a religious congregation.

It is argued by appellant that the determination of the appeal board on June 19, 1956, was arbitrary and capricious. Appellant takes the position that his classification as 1-A-O was necessarily a compromise. The only proper classification, according to appellant, would be either 4-E (ministerial), 1-O (complete exemption from all military service), or an outright 1-A.

It is apparent from appellant's brief that there is no real claim that he was entitled to a ministerial classification. A claim to ministerial status would be frivolous in view of the clear showing in Exhibit 1 that appellant was a publisher, or ordinary member of his religious group, as distinguished from the company servant who occupies the position which would be that of a minister within the meaning of Section

16(g)(3) of the Universal Military Training and Service Act (50 U.S.C. App. § 466(g)(3)).

Where then does appellant stand in objecting to what he calls compromise? His only claim, as evidenced by his letter of June 11, 1956, to the appeal board, was that he was entitled to ministerial status. Since he was not within the statutory definition of a regularly or duly ordained minister of religion, on his own argument concerning compromises he should have been classified as 1-A, available for all military duties, combatant and noncombatant, and has no standing to complain that the board excused him from combatant service.

Entirely aside from the fact that such alleged compromise was not prejudicial to appellant, it is to be remembered that there is no reason to speculate that the classification was the result of compromise.

The only classification which resulted in an order for induction was that of June 19, 1956. When the Appeal Board acted on that day it knew the following things which supplied an ample basis in fact for a 1-A-O classification.

1. The members of registrant's Local Board had twice interviewed the registrant, but none became convinced that appellant was entitled to exemption from all military service.

2. Two Hearing Officers of the Department of Justice held hearings at which the registrant attempted to show that he was entitled to such exemption. Both such officers believed that the objection should be sustained as to combatant but not as to noncombatant military service.
3. The Department of Justice had twice recommended that the claim be sustained as to combatant service only.
4. The registrant had shown both to a Hearing Officer and directly to the Appeal Board that his objection to noncombatant service was on a ground that this Court has held is not a valid basis for such an exemption, i.e., such service would interfere with his opportunity to preach the gospel as a lay minister of a religious sect all of whose members are such ministers. (*Tomlinson v. United States*, *infra*).
5. Not even one member or officer of any of the boards and agencies which had considered the claim prior to June 19, 1956, had been persuaded that the registrant should be excused from noncombatant service.

Those facts constituted an even more substantial basis in fact for the June 19, 1956, classification by the appeal board in this case than there was for similar classifications considered by this Court in *Tomlinson v. United States*, 216 F. 2d 12, *supra*, and *White v. United States*, 215 F. 2d 782, *supra*. In both of those cases this Court confirmed the convictions of Class 1-A-O registrants.

In classifying appellant in 1-A-O the board was determining a state of mind rather than making a

finding as to objective facts. There having been a basis in fact for its determination, the correctness of its decision was not reviewable in the court below. The board may, or may not, have correctly read the mind of the registrant, but the burden was upon him to convince the Selective Service officials of the sincerity of his claim for exemption under the statute.

He failed and may not now reargue that claim in another forum by the simple expedient of relabeling it as "due process of law."

POINT TWO

THE COURT BELOW CORRECTLY RULED THAT THE APPELANT WAS NOT ENTITLED TO HAVE THE ORIGINAL FBI REPORTS AT THE TRIAL FOR THE PURPOSE OF COMPARISON OF THE RESUME WITH THE REPORTS

In urging that there was reversible error of the trial court in refusing defendant the right to use the FBI reports at the trial, appellant is asking this Court to overrule its decisions in *White v. United States*, 215 F. 2d 782, *supra*, certiorari denied 348 U.S. 970 (1955), and *Kaline v. United States*, 235 F. 2d 54 (1956).

In *White v. United States*, *supra*, this Court held, at page 790:

"We see nothing in the requirements of the statute or in the demands of due process or in what was decided in the Nugent case which would require that any portion of an FBI investigation undertaken for these purposes should be made available to the registrant either before the hearing officer or at the time of his prosecution for failure to submit to induction. All of the practical considerations relating to a probation report which were alluded to in *Elder v. United States*, footnote 11, *supra*, and in *Williams v. People of State of New York*, *supra*, apply here as reasons for denying similar access to the FBI report."

That determination was confirmed in the *Kaline* case, *supra*, where this Court held at page 61:

"Next appellant alleges that the trial court was in error when it quashed the *subpoena duces tecum* as to the Federal Bureau of Investigation report on his case. Appellant argues that at least the trial judge should have made an *in camera* inspection in order to see if a fair resume of the F.B.I. report had been sent to the appellant. We disagree. Appellant was given a resume of the report as required under the holding of *United States v. Nugent*, 1953, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417, and *Simmons v. United States*, 1955, 348 U.S. 397, 75 S.Ct. 397, 99 L.Ed. 453. Our decision in *White v. United States*, 9 Cir., 1954, 215 F. 2d 782, *supra*, and the Fourth Circuit's decision in *Campbell v. United States*, 4 Cir., 1955, 221 F. 2d 454, 460, are dispositive of the point.

A dictum of this Court in a later case indicates that it then considered the *White* and *Kaline* decisions as still binding on the District Courts in this Circuit.

(See footnote 4 on page 17 of the decision in *Clark v. United States*, 236 F. 2d 13 (9th Cir. 1956)).

The *White*, *Kaline* and *Clark* decisions of this Court were handed down before the decision of the United States Supreme Court in *Jencks v. United States*, 353 U.S. 657 (1957). But there is nothing in *Jencks* which mandates or even argues for a change in the rule established in *White*. The possible effect of the *Jencks* decision upon conscientious objector cases was analyzed by the Court of Appeals for the Fourth Circuit in *Alva Eugene Blalock v. United States*, which was decided on August 7, 1957. A copy of that opinion is printed as Appendix A of this brief. The holding of that court is a more convincing argument for the Government than its counsel could make.

V. CONCLUSION

Appellant was classified for noncombatant military service after protracted hearings before the draft authorities. He was afforded due process of law in all such proceedings and was therefore guilty of a violation of the Universal Military Training and Service Act in refusing to submit to induction after such classification. There was no error at the trial and the court below properly refused to require production of the original reports of the Federal Bureau of Investigation.

The judgment of conviction should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7435

Alva Eugene Blalock
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA,
AT CHARLOTTE

(Argued June 3, 1957. Decided August 7, 1957.)

Before SOPER, SOBELOFF, AND HAYNSWORTH, Circuit Judges

Hayden C. Covington (Richard M. Welling on brief)
for Appellant, and J. M. Baley, Jr., United States
Attorney, (Hugh E. Monteith, Assistant United
States Attorney, on brief) for Appellee.

SOBELOFF, Circuit Judge:

This appeal is from a conviction under an indictment charging a violation of the Universal Military

Training and Service Act. 50 U.S.C.A. Appendix¹ by refusing to submit to induction into the armed forces for non-combatant duty. At his trial, the defendant, Alva Eugene Blalock, challenged the appeal board's denial of his claim for 1-O conscientious objector classification, which would have immunized him from military service, both combatant and non-combatant. He also asserted that certain procedural rights were denied him in the course of the administrative process. These contentions are repeated here.

The appellant, a Jehovah's Witness, claims that, as a member of that sect and by personal conviction, he

¹ The indictment is based on Section 462, the penalty section; but the procedural provisions to be considered are in Section 456 (j), 65 Stat. 83; and as we shall have occasion to consider several aspects of this section, it is here set forth in full:

(j) Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451 - 454 and 455 - 471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncom-

is conscientiously opposed to war and service in the armed forces. Since his original registration with Local Board No. 85 in Albemarle, North Carolina, in March, 1951, his relationship with the Selective Service System has been extensive. He has had a number of personal appearances before the local board, several appeals to the appeal board, and has undergone at least two F.B.I. investigations and hearings before Justice Department examiners.

In answering the questionnaire submitted by the local board, the appellant claimed exemption as an ordained minister of Jehovah's Witnesses and stated his objections to military service on grounds of conscience. He thereafter filed a special conscientious objector form and asserted, in addition, that he could not accept any appointment to do civilian work in the national interest, as is required by law of those exempted as conscientious objectors. He insisted that to obey this requirement would interfere with his service to God.

The board nevertheless classified him 1-A. A subsequent personal appearance in February, 1952, how-

batant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be found to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors. As amended June 19, 1951, c. 144, Title I, § 1 (1-q), 65 Stat. 83; June 30, 1955, c. 250, Title I, § 101, 69 Stat. 223; Aug. 9, 1955, c. 665, § 3(b)—(d), 69 Stat. 603.

ever, resulted in a III-A classification, since his mother, sister, and two brothers were dependent upon him for support.

The following year, in May, 1953, Blalock was reclassified 1-A by the local board². Upon appeal to the appeal board, it made a preliminary determination that he was not entitled to a 1-O conscientious objector claim, and in accordance with the required procedure, his file was forwarded to the Department of Justice for investigation, hearing, and recommendation. Section 6 (j), 50 U.S.C.A. Appendix, Sec. 456 (j), 65 Stat. 83. As a result of these procedures, the Department recommended that the 1-O classification be granted. The resume of evidence, forwarded to the appeal board by the Department, pointed out favorable evidence gleaned from the investigation. The hearing examiner had been impressed with Blalock's demeanor, and concluded that he was devoutly religious and sincere in his opposition to war. With this recommendation before it, the appeal board granted the appellant a 1-O classification, which exempted him from all military duty, both combatant and non-combatant. However, he did thereby become subject to assignment to civilian work in the national interest. Sec. 6 (j).

When, later, Blalock refused to select between several alternatives of civilian work offered him, a meeting was called at which Colonel Mathis, a State Selective Service Officer, and the local board sought to reach an agreement with Blalock. At this interview, Mathis

² The board thought the hardship conditions no longer existed to justify continuation of the III-A classification. This was apparently based upon various circumstances, such as that the registrant's mother was drawing Social Security benefits, his younger brothers and sisters had become old enough to assume part of the family's economic burden, assistance from older brothers and sisters was available to the family, and the loss of direct support from the registrant would be partly off-set by army allotments.

asked the registrant if he would work in a defense plant, and Blalock's reply was that he would, because the use made of the products "isn't my responsibility" and "is no concern of mine." In view of this admission, coupled with a declared intention not to perform any civilian work in the national interest if so ordered by the board, the State Director reopened the case. The local board reclassified him 1-A, and again the case was appealed and referred by the appeal board to the Department of Justice for investigation, hearing, and recommendation.

At the departmental hearing which followed, the examiner asked a question similar to that propounded at the earlier draft board interview pertaining to Blalock's willingness to work in a defense plant. He again answered that his religious beliefs would not prevent him from engaging in such work if it were necessary. Although the hearing officer recommended that the 1-O claim be sustained, the Special Assistant to the Attorney General, on review of the file, recommended denial of the claim in view of the registrant's statement that he would work in a defense plant. The recommendation, however, suggested that he be given a 1-AO classification, which would leave him eligible for military service but only in a non-combatant capacity.

Afforded an opportunity to reply to the Department's recommendation, Blalock altered his position regarding defense work, stating that he would not engage in such work if the materials were to be used in war. Thereupon, the appeal board, as the Department had suggested, classified appellant 1-AO, rendering him subject to non-combatant military service. On being ordered to report, he reported, but refused to submit to induction; and this criminal proceeding followed.

On at least several occasions during his draft board history, appellant made known his opposition to the political, material wars of men and nations, although he stated that he would kill in defense of himself and his brothers as authorized by God. In voicing this opposition, to the administrative officials before whom he appeared, he sought to persuade them that he could not, consistently with his religious views, maintain any position but a neutral one regarding earthly conflicts.

The success or failure of such attempted persuasions must, of course, in the last analysis, rest upon the board's judgment of the registrant's sincerity. Human experience has devised no precise gauge for appraising a subjective belief lodged in the mind and heart of the person himself and never truly known by others. Sincerity can be judged only from the individual's demeanor, the consistency of his statements, appraisals by persons to whom he is known, and other immeasurable factors which may be deemed significant by some men but not by others.

Not only could the appeal board consider the decision of the local board which had had an opportunity to view the registrant's demeanor, but it could determine and evaluate any incongruity in his condemnation of war on the one hand, and his willingness, on the other, to do defense work with avowed indifference to the destructive use of the products of his labor. Had Blalock actually worked in a defense plant, that circumstance would have been a pertinent one in evaluating the conscientiousness of his objection to non-combatant duty. *Jones v. United States*, 4 Cir., 241 F. 2d 704. His willingness to do so, though he has not in fact done so, is also pertinent. See *Witmer v. United States*,

348 U.S. 375. See also *Meredith v. United States*, 4 Cir., F. 2d , today decided. The Board could consider, in addition, that his attitude regarding defense work was later modified when the adverse effect of his admission became known to him.

The District Judge also pointed out certain variations in the several versions offered by the defendant of his medical history, which could have been interpreted by the fact finders as reflecting on his over all sincerity.

In a prosecution for refusing to submit to induction, the scope of judicial inquiry into the administrative proceedings leading to the defendant's classification is very limited. The range of review is the narrowest known to the law. *Campbell v. United States*, 4 Cir., 221 F. 2d 454. The "clearly erroneous" rule applied in equity appeals has no place here, nor even the "substantial evidence" rule of the Administrative Procedure Act. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. *Witmer v. United States*, 348 U.S. 375; *Goff v. U. S.*, 4 Cir., 135 F. 2d 610.

We cannot say that upon the record before the board there was no factual basis for the classification.

II

A ground for reversal, procedural in character, is also pressed. It relates to the production of the F.B.I. report on its investigation of the defendant.

As a special protection for conscientious objectors, it is, as we have seen, required by the Universal Mili-

tary Training and Service Act that whenever an appeal is taken from a local board's rejection of a claim for exemption based on conscientious objection, before acting upon the appeal the board must first refer the case to the Department of Justice for investigation, hearing, and recommendation. It becomes necessary now to consider this procedure more closely.

The agency that conducts the investigation for the Department is its Federal Bureau of Investigation. After a hearing, which is conducted, not by the F.B.I., but by a hearing officer, there follows a recommendation by still another department officer specially designated. The appeal board is required to consider, but it is not bound by, the recommendation. In accordance with the prevailing practice, the defendant was furnished a resume of the investigation. It revealed nothing new that was damaging or in dispute. He was, however, denied the basic F.B.I. records. The appeal board also received a resume, but not the F.B.I. records themselves, so that nothing was communicated to the appeal board beyond what was made known in identical language to the defendant. At the trial in the District Court, the defendant demanded that these records be produced for the Judge to determine the fairness and completeness of the resume. The Judge refused to inspect F.B.I. records and quashed the subpoena duces tecum.

It is argued that withholding this report from the appellant and from the appeal board was a denial to him of procedural fairness, in that he was unable to test the adequacy of the resume.

Relying on *United States v. Nugent*, 346 U.S. 1, and *United States v. Campbell*, 4 Cir., 221 F. 2d 454,

the District Judge ruled that the registrant is not entitled to a copy of the F.B.I. report, but only to the resume.

The defendant claims, however, that the nature of the evidence and the purpose for which he wishes to examine it are not the same here as in the *Nugent* case, and thus attempts to distinguish the two cases. He maintains that in *Nugent*, the registrant desired the F.B.I. report only to rebut the adverse evidence contained therein, whereas here the object is to determine whether the favorable evidence was fairly and adequately summarized for the appeal board. In our opinion, a distinction on this basis would be untenable. While this small dissimilarity between the two cases may be noted, it is not such as to put this case beyond the scope of the *Nugent* rule. Were we to adopt the suggested distinction, its inevitable result would be to entitle the registrant to the report in all cases. The summary, which the *Nugent* case declares is all that he is entitled to have, would thus become necessary, and the Supreme Court's deliberate differentiation between the resume and the full reports would be emptied of meaning. This differentiation was based upon the court's concept of the nature and purpose of the investigation and departmental procedure, for in denying *Nugent* the F.B.I. reports, the Supreme Court emphasized that Congress was not compelled to provide a Justice Department investigation auxiliary to the draft board procedures, and that in so doing, "it has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant." *United States v. Nugent*, 346 U.S. 1, 9.

It was pointed out in *Gonzales v. United States*, 348 U.S. 407, 412, that the statute itself does not, in terms, provide even for the resume, but this was read into the law by the Supreme Court so as to accord with "underlying concepts of procedural regularity and basic fair play," tempered, however, in light of the problems entailed in meeting "the imperative needs of mobilization and national vigilance—when there is no time for litigious interruption." *United States v. Nugent*, *supra*, p. 10.

In holding as we do, we are not unmindful of the recent decision in *Jencks v. United States*, 353 U.S. 657. For the reasons which we shall state, we conclude that it cannot govern this case. Though somewhat analogous, the two are not the same. In *Jencks* it was held that when a prosecution witness took the stand against an accused, the latter could demand to see any statements concerning him made to the F.B.I. by the witness, to ascertain whether or not they conflicted with the testimony given in court. The theory was that a defendant needs such information to determine whether the reports contain material for cross-examination.

The history of the treatment of F.B.I. reports, both in *Nugent* and in other cases, however, indicates the sharp distinction between applications by defendants in ordinary criminal cases to examine statements made to the F.B.I. by witnesses called to the stand by the Government, and demands for the production of such reports in conscientious objector cases. It is arguable that the resume furnished the accused in a Selective Service case is like a witness; that the resume should be subject to testing for fairness and completeness by a process similar to that applied to a witness

whose testimony may be impeached by showing prior conflicting statements. Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize. See *United States v. Evans*, 115 F. Supp. 340 (Hincks, J.) In *Simmons v. United States*, 348 U.S. 397, the point did not squarely arise, for there, without the necessity of looking at the original reports, it was obvious from the testimony in court that the summary was incomplete. The appellant argues however, that it does not follow in the absence of such testimony that the fairness of the report must be presumed. However plausible these contentions, we cannot accept them, for the point was considered and rejected in *Nugent*.

The Supreme Court has manifested its view that the investigation required under the Selective Service Act in cases of conscientious objectors is *sui generis*, and that production of reports of such investigations is not controlled by the rule applicable to criminal cases generally in respect to the use of prior conflicting statements to impeach witnesses. It is to be noted that the *Jencks* opinion makes no reference whatever to *Nugent*. No less noteworthy is the fact that when Chief Justice Vinson wrote for the Court in *Nugent*, he failed to mention his own opinion in *United States v. Reynolds*, 345 U.S. 1, written only three months before, in which it was recognized that in certain criminal cases, the right to see the F.B.I. reports would exist. Significant, also, is the fact that *Gordon v. United States*, 344 U.S. 414, decided one month before the *Reynolds* case, and which, like the *Jencks* case, dealt with the broad question of the right of a defendant to examine F.B.I. reports and to confront, on cross-ex-

amination, an adverse witness, was nowhere referred to in the *Nugent* decision.

These circumstances gain added meaning when we bear in mind that the *Nugent* decision, as explained by Mr. Justice Clark in *Simmons v. United States*, 348 U.S. 397, 403, "represented a balancing between the demands of an effective system for mobilizing the nation's manpower in times of crisis, and the demands of fairness toward the individual registrant." This very feature, which militates against a distinction between the present controversy and the *Nugent* case, suggests a distinction between those cases as a class and cases of which *Jencks* is representative.

Whatever may be the boundaries and limitations of the *Jencks* doctrine, we think it clear that it is subject to the qualification of the *Nugent* case for the type of problem here involved, that is, testing the accuracy of the resume furnished in conscientious objector cases, in contrast to impeachment of witnesses in criminal cases. The *Nugent* case explicitly holds that if the defendant was furnished a resume and accorded an opportunity to be heard, he cannot complain that he was not shown the investigative records, nor can he insist on their production at the criminal trial.

Rarely would a Court of Appeals be justified in declaring devitalized and no longer to be followed a Supreme Court decision passing directly on the precise point at issue, because of another decision of the Supreme Court in a related, though different area. The resolution of possible inconsistencies in the Supreme Court's decisions is ordinarily not the prerogative of inferior courts. *United States v. Ullmann*, 2 Cir., 221 F. 2d 760; cf. *Barnette v. West Virginia Board of Edu-*

cation, 47 F. Supp. 251, Parker Ch. J., affd. 319 U.S. 624.

While *Jencks* points in the direction of a freer access, in some circumstances at least, to F.B.I. files than the Court was willing to sanction in *Nugent*, it is not for us to extend the *Jencks* doctrine to penetrate the sphere in which the *Nugent* case unmistakably declared the applicable law. The holding in *Nugent* has not been retracted, and although the Supreme Court has several times been invited to reconsider the matter, it has declined to do so³. We hold, therefore, that the balance struck in *Nugent*, of affording the defendant a resume and not the original reports, governs here.

Affirmed.

³ This statement is supported by examination of the briefs filed by convicted defendants in support of petitions for certiorari in the following cases, in each of which the point was squarely raised: *Tomlinson v. United States*, 9 Cir., 216 F. 2d 12, cert. den. 348 U.S. 970, Oct. Term, 1954, No. 391; *White v. United States*, 9 Cir., 215 F. 2d 782, cert. den. 348 U.S. 970, Oct. Term, 1954, No. 390; *United States v. Simmons*, 7 Cir., 213 F. 2d 901, reversed, 348 U.S. 397, Oct. Term, 1954, No. 251; *United States v. Dal Santo*, 7 Cir., 205 F. 2d 429, cert. den. 346 U.S. 858. Oct. Term, 1953, No. 249.

No. 15649 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

APPELLEE'S BRIEF.

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No. 15649

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L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

On July 12, 1949, Appellant was a member of the Brotherhood of Railroad Trainmen and was employed as a brakeman by the Appellee on its South Central District, operating out of Las Vegas, Nevada. Appellant reported for duty on said date at 9:15 P.M. and was instructed to deadhead to Nipton, California, for swing service to protect Train No. X 1622 E [R. 17, 18, 20]. Appellant returned to Las Vegas, Nevada, on Train No. X 1623 E at 12:35 A.M., July 13, 1949, contrary to express instructions to remain at Nipton, California, to protect X 1622 E, estimated to arrive there at approximately 4:00 A.M., July 13, 1949 [R. 18, 26, 27, 28]. On July 16, 1949, Appellant was charged with violating Operating Rules 700 and 702, and was given written notice on said date to appear for investigation and hearing on said charges the following day at 10:00 A.M., July 17, 1949 [R. 13]. Appellant appeared and acknowledged receipt of written

notice within the time provided in his schedule [R. 13]. However, he requested a postponement upon the ground that his representative, the local chairman of his brotherhood, was not present [R. 14, 15]. Appellant's representative, local chairman E. C. Grounds [R. 16], was in the City of Las Vegas, Nevada, at 7:50 P.M., July 16, 1949, was rested by 10:00 A.M., July 17, 1949, and did not depart from Las Vegas until 8:00 P.M. of July 17, 1949 [R. 23]. No explanation was given as to why Appellant's representative was not present at the investigation and hearing at 10:00 A.M., July 17, 1949. Nevertheless, the requested postponement of investigation and hearing was granted until July 18, 1949, at 9:30 A.M. [R. 14], and consented to by Appellant in writing [R. 15].

On July 18, 1949, Appellant requested a further postponement, claiming that his representative, Mr. E. C. Grounds, was in Milford, Utah, and he did not wish to have the investigation until after the return of Mr. Grounds. He was told that the investigation and hearing would be deferred until 2:30 P.M., and advised to get another representative [R. 16]. At 2:30 P.M., July 18, 1949, Appellant did not appear and the investigation hearing was held in his absence, with questions propounded to various employees by W. B. Groome, Assistant Superintendent, and the proceedings reported by S. M. Smith, Chief Clerk to the Assistant Superintendent [R. 17-29]. On July 24, 1949, Appellant was discharged from the service of Appellee [R. 7].

Three days later, by letter dated July 27, 1949, directed to Death Valley Lodge No. 781, of the Brotherhood of Railroad Trainmen, Appellant requested action for his reinstatement with pay for all time lost and all seniority and all rights restored [R. 51]. Negotiations between the

Appellant's representative and the Appellee resulted in an offer by Appellee to return Appellant to service on a leniency basis [R. 29-33]. This offer was rejected by Appellant and Appellee was notified that the case would be submitted to the National Railroad Adjustment Board [R. 34-37]. On January 11, 1951, Appellant's claim for restoration to service with all rights unimpaired and for pay for all time lost since July 13, 1949, was submitted by the Brotherhood of Railroad Trainmen in behalf of Appellant, to the National Railroad Adjustment Board, pursuant to the provisions of the Railway Labor Act (Title 45 U. S. C. A., Sec. 151 *et seq.*) [R. 5-56]. Oral hearing was waived by Appellant in his submission [R. 12], and agreed to by Appellee [R. 57].

On June 25, 1952, the National Railroad Adjustment Board issued Award No. 15509 in Docket No. 27393, denying Appellant's claim in its entirety [R. 56-59]. On June 6, 1955, Appellant filed a Complaint in the District Court alleging that his dismissal was in violation of the collective bargaining agreements between the Brotherhood of Railroad Trainmen and the Appellee, and demanding judgment in the amount of \$118,517.00 [R. 3-5]. Prior to Answer, Appellee filed a motion for summary judgment supported by affidavits, the Agreement between the brotherhood and Appellee, and the proceedings before the National Railroad Adjustment Board. Appellant argued that he had not authorized submission of his case to the Board, denied that the brotherhood had authority to represent him, and denied notice or knowledge that his claim had been presented to the Board until after it had made its decision. Because of the doubt thus created relative to the brotherhood's authorization, Appellee's first motion for summary judgment was denied on May 11, 1956.

Appellee then filed its Answer denying Appellant's allegations of wrongful dismissal, and alleging as a separate defense the authority contained in the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen for representation of individual claimant members before any person, board or other tribunal provided by law or otherwise. Appellee further alleged, as a part of said defense, the proceedings before the Board as a final determination of the matters alleged in the Complaint, and a bar to the maintenance of this action by the Appellant [R. 68-72].

Appellee then served Appellant with a request for admission concerning the authorization for representation contained in the brotherhood's Constitution, By-Laws, and Rules [R. 72-74], which was admitted by the failure of Appellant to answer said request. On July 20, 1956, Appellee took the deposition of D. R. Altier, General Chairman of the Brotherhood of Railroad Trainmen, concerning correspondence between said brotherhood and Appellant from 1949 through 1952, and showing continual information and advice to Appellant of proceedings in his case, both with officials of Appellee, and with respect to and determination by the National Railroad Adjustment Board [R. 74-84]. Appellee then sought and obtained leave to move for summary judgment [R. 85-86], and thereafter filed its motion for summary judgment [R. 87-89]. After argument, on May 22, 1957, Appellee's motion for summary judgment was granted [R. 94], from which this appeal has been taken by Appellant. Although Appellant at first argued in the District Court that he was not bound by the action of his brotherhood, Appellant, in his specification of errors to this court, now states that he does not rely on any claim that he did not authorize the submission of his case to said Board [R. 97].

ARGUMENT.

I.

A Discharged Employee of a Carrier Who Submits His Claim to the National Railroad Adjustment Board Upon the Merits and Receives an Adverse Award, May Not Thereafter Sue His Employer in Court for Damages for Wrongful Discharge.

Although the question presented by this appeal has never been decided by this court, it is not novel or new.

The Railway Labor Act, 45 U. S. C. A., Secs. 151-188, creates a National Mediation Board to assist in negotiations, arbitration and conciliation relative to collective bargaining agreements. It also creates a National Railroad Adjustment Board with jurisdiction to consider and determine disputes arising under collective agreements and disputes with carriers affecting individual members of a Union.

The Supreme Court of the United States has interpreted the provisions of the Railway Labor Act in a number of leading cases involving jurisdiction of the National Mediation Board and the National Railroad Adjustment Board, questioned authority of a Union to represent its members in negotiations for collective bargaining agreements, interpretations of said agreements, finality of awards in individual grievances, and questioned authority of a Union to represent its individual members in individual grievances before the National Railroad Adjustment Board.

Prior to its decision in *Moore v. Illinois Central Railroad Company* (1940), 312 U. S. 630, 85 L. Ed. 1089, both the railroad brotherhoods and the National Railroad Adjustment Board assumed that the Board had exclusive jurisdiction to consider all disputes, not only as to nego-

tiations for collective bargaining agreements and interpretation of said agreements, but also as to individual grievances arising under such agreements. In the *Moore* case a member of the Brotherhood of Railroad Trainmen filed an action for damages for wrongful discharge based upon a collective agreement between the Brotherhood of Railroad Trainmen and the defendant railroad. The defendant contended, among other things, that such action was premature because the plaintiff had failed to exhaust the administrative remedy given to an employee under the Railway Labor Act to submit his claim to the National Railroad Adjustment Board. The United States Supreme Court concluded that the remedy for an individual claim or grievance provided under the Railway Labor Act was not exclusive and "that the petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to a suit for wrongful discharge."

In the same year, 1941, the Supreme Court granted certiorari in the case of *Washington Terminal Co. v. Boswell*, 124 F. 2d 235. Affirmed 1942, 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694. This case involved a dispute between the carrier and two Unions. The defendant Unions claimed that they were entitled under their agreement to do certain work which others had previously done. The carrier rejected this claim, whereupon the employees made a submission of the dispute to the National Railroad Adjustment Board, which made an award in favor of the employees. Instead of complying with the award, the carrier plaintiff commenced this action for a declaratory judgment, which was dismissed by the District Court, affirmed by the United States Court of Appeals for the District of Columbia, and affirmed by the United

States Supreme Court, by a divided court. The suit sought an adjudication of rights under the contract, and a declaration that the Board's award and order were void. No opinion was filed by the Supreme Court.

However, Justice Rutledge, speaking for the majority of the United States Court of Appeals, concluded that the Board's decisions are enforceable, not merely advisory or private, and are binding on both parties. In his opinion he construed the effect of Section 153 of the Act as follows:

"Section 3 establishes the Adjustment Board and gives its first division '*jurisdiction* over disputes involving train-and-yard-service employees.' 45 U. S. C. A., Sec. 153, First (h). The dispute is referred to the Board, after unsuccessful private negotiation, 'by *petition* of the parties or by *either party*' id. (i). Awards must be stated in writing and 'shall be *final and binding* upon both parties' except as to money awards' id. (m). When the award favors the petitioner-employee, the Board must make 'an *order*, directed to the carrier, to make the award effective.' Id. (o). '*Jurisdiction*,' '*petition* * * * by either party,' '*final and binding upon both parties*,' '*an order, directed to the carrier*,' these are not words of polite suggestion. They are terms of duty, if not of force. They describe power and decision, not mere advisory intermediation. That is true though the Board has no power to enforce its orders otherwise than by decision. In that respect the awards and orders may be said to constitute a kind of administrative declaratory judgment. * * *

"But it is said the decision in *Moore v. Illinois Central R. Co.*, supra, and language of the opinion, establish that Congress intended the Board to be a private agency and its awards to have private, ad-

visory character. * * * The *Moore* case holds that Congress has not compelled disputants to go before the Board. It does not hold that, having gone, they can disregard the award and its consequences at will."

Following its decision in the *Washington Terminal Co.* case, the Supreme Court next had before it the case of *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 89 L. Ed. 1886. Its first opinion in this action was filed June 11, 1945. The facts in this case, although somewhat complicated, may be summarized as follows: A dispute had arisen between engineers, firemen, and yardmen, all employees of the carrier, concerning terms of their employment. In 1934 a settlement agreement was apparently reached on all matters except the issue of "starting time." The Brotherhood of Railroad Trainmen claimed that Article 6 of a 1927 agreement between said brotherhood and the carrier became applicable to certain employees with the settlement of 1934. This Article related to "starting time." The carrier disagreed, and frequent negotiations were had on the property. In 1936, plaintiffs authorized their brotherhood to file a complaint with the National Railroad Adjustment Board. This submission to the Board was intended to secure compliance with Article 6 of the agreement, and there was no claim for money damages. A settlement was reached between the brotherhood and the carrier by letter agreement dated October 31, 1938, which also provided for a release of all claims then pending, with a further provision that no other claims of a like or similar nature accruing prior to the settlement date would be presented. The carrier and the brotherhood then jointly requested that the pending claim be withdrawn from the Docket of the Board, which

was done. Thereafter a further dispute arose concerning the applicability of Article 6 of the agreement during the period between 1934 and the settlement of 1938. The brotherhood, in May, 1939, made a submission to the Board of claims for penalty damages accruing between 1934 and 1938, contending that the settlement agreement of October 31, 1938, was effective only to fix "starting time" for the future, and had no effect to waive or determine individual claims for penalty damages prior to said agreement. The carrier contended that the settlement precluded the submission of any claim, either individual or collective, occurring prior to the settlement date. A referee was called in to sit with the Board because of a deadlock, whereupon the Board agreed with the carrier and denied the claim submitted May 18, 1939, by the brotherhood.

Plaintiffs then commenced this action for penalty damages for alleged violation of the agreement. The carrier moved for summary judgment, claiming that the award of the Board in the brotherhood's submission of May, 1939, was final and binding on the plaintiffs. The plaintiffs claimed that the brotherhood had no authority to release their individual claims in the settlement of 1938; that the brotherhood's constitution and rules contained an express prohibition against such action by brotherhood officials without specific authority from the individual members, and that the carrier had knowledge of such prohibition. Plaintiffs also questioned the validity and conclusive effect of the Board's award, and contended that its decisions are void because it acts "merely as an arbitrator." In addition to its claim of "finality," the carrier also contended that the brotherhood had authority to make the

submission in question to the Board by virtue of the statutory provisions of the Railway Labor Act, without specific authority.

The District Court agreed with the carrier, and granted summary judgment to the defendant. The United States Court of Appeals for the Seventh Circuit concluded that the record presented a question of fact concerning the authority of the brotherhood as to whether or not the brotherhood had been authorized to compromise, release, or settle the individual claims of the plaintiffs. The summary judgment was reversed by the appellate court, whereupon the Supreme Court granted Certiorari, and thereafter affirmed the judgment of the Court of Appeals upon the ground that the record did present an issue of fact concerning the authority of the Brotherhood to represent the plaintiffs.

Although the decision in this case was based primarily upon the issue of authorized representation, which is not an issue in the instant case, nor even before this court for consideration, there was also an issue on the "finality" provision of the Act (Sec. 153 First (m), 45 U. S. C. A.) which was squarely before the court and necessarily decided by the court. It is interesting to note that the positions of the carrier and the brotherhood in the *Elgin* case are just the reverse of the parties in the prior *Washington Terminal Co.* case. In the *Elgin* case the brotherhood, instead of the carrier, was contending that Board decisions are merely advisory and would not, therefore, preclude an action for a declaratory judgment. The Supreme Court, in the words of the late Justice Rutledge (who also wrote the majority opinion of the United States Court of

Appeals in the *Washington Terminal Co.* case), construed the "finality" provision of the Act as follows:

"Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.

"The third and most sweeping contention undercuts all other issues concerning the award's effect, whether for validity or finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention, founded upon language of the opinion in *Moore v. Illinois C. R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving no element of legal effectiveness, with the consequences that the parties are entirely free to accept or ignore the Board's decisions.

"At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history. The *Moore* case involved no question concerning the validity of the legal effectiveness of an award when rendered. Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise."

The Supreme Court then discussed the difference between "major disputes," which go to the National Mediation Board under the Act, and grievances, which go to the National Railroad Adjustment Board for decision.

As to "Major disputes," the court pointed out that the processes under the Act are clearly voluntary, involving negotiation, meditation, arbitration, and conciliation, with no authority empowered to decide the dispute, unless the parties themselves agree to arbitration. The Court then construed the procedure for the settlement of grievances as follows:

"The course prescribed for the settlement of grievances is very different beyond the initial stage. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement. * * *

"The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them."

Thereafter, the Supreme Court granted a motion for reargument of the *Elgin* case and filed its opinion on March 25, 1946, 327 U. S. 661, 90 L. Ed. 928. The Court amplified its former opinion concerning the finality of a grievance award by the Board, in these words:

"Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. Its action in adjusting an individual grievance at the instance of the collective bargaining agent is entitled to presumptive weight. * * * We did not rule, and there is no basis for assuming we did, that an em-

ployee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.”

Order of Railway Conductors v. Pitney (decided Jan. 14, 1946), 326 U. S. 561, 90 L. Ed. 318, was a case involving a dispute between two brotherhoods concerning certain work under agreements with the Central Railroad Company of New Jersey. The railroad was in reorganization proceedings under the Bankruptcy Act. The trustee agreed with the trainmen, whereupon the conductors brought this suit in the reorganization court. The District Court agreed with the trainmen and dismissed the petition on the merits. The Circuit Court of Appeals held that the petition should have been dismissed on jurisdictional grounds because the remedies under the Railway Labor Act for the settlement of disputes such as here involved are exclusive.

Having granted Certiorari, the Supreme Court held that the District Court had supervisory powers to instruct its trustees, but that an injunction should not issue, if at all, until after submission of the dispute to the National Railroad Adjustment Board for its interpretation of the agreements.

“The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under Section 3 First (o) and (p) grant a money award subject to judicial review with an allowance for attorney’s fees should the award be sustained. Not only has Congress thus designated an

agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.”

The next important Railway Labor Act case before the United States Supreme Court was *Slocum v. Delaware, L. & W. R. Co.* (decided April 10, 1950), 339 U. S. 239, 94 L. Ed. 796. In this case the respondent railroad had separate collective bargaining agreements with two unions. A dispute arose between the two unions concerning the scope of their respective agreements. Negotiations were had between the railroad and the unions without agreement. Instead of invoking the jurisdiction of the Adjustment Board, the railroad filed this action in a New York State court for a declaratory judgment interpreting the contracts and was granted such a judgment on the ground that the decision in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, left state courts free to adjudicate disputes arising out of a collective agreement without obtaining the Board’s interpretation of that agreement. The Supreme Court reversed and remanded in these words:

“Our holding here is not inconsistent with our holding in *Moore v. Illinois Cent. R. Co.* * * * Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad’s action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. * * *

“We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* Case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion.”

On the same day that the court decided the *Slocum* case, April 10, 1950, the Supreme Court also filed its opinion in *Order of R. C. of A. v. Southern R. Co.*, 339 U. S. 255, 94 L. Ed. 811. In this case a dispute arose between certain conductors and the railroad concerning the railroad's obligations under an agreement. Negotiations were commenced for a construction of the agreement. The railroad then filed an action in the state court for a declaratory judgment interpreting the agreement. The state trial court concluded that it lacked jurisdiction, citing *Order of R. Conductors v. Pitney*, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322. The state Supreme Court reversed, holding that the state court did have power to interpret the agreement. The state trial court then entered a declaratory judgment as requested by the railroad, which was affirmed by the state Supreme Court.

The Supreme Court of the United States granted Certiorari, and thereafter reversed, stating:

“For reasons set forth in the *Slocum* case, 339 U. S. 239, ante, 795, 70 S. Ct. 577, we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute.”

Following its decision in the *Slocum* case and the *Order of R. C. of A. v. Southern R. Co.* case, the Supreme Court denied a petition for a Writ of Certiorari on October 22,

1951, in the case of *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224, cert. den. 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648. In this case plaintiff, who was a discharged railroad employee, filed a Complaint for wrongful discharge. The defendant moved for summary judgment, based upon a showing that plaintiff, through his union representative, had prosecuted his claim for reinstatement and for time lost before the National Railroad Adjustment Board, which had sustained the dismissal. Summary judgment was granted, and affirmed on appeal, by the United States Court of Appeals for the Fifth Circuit.

Because of the importance of the denial of certiorari in this case, the following quotations from the opinion of the Court of Appeals are indeed significant:

“The primary question in the case is whether the voluntary submission of the employee’s claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee’s contentions, presented a bar to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages. We are of the opinion that under these circumstances, the proceeding before the National Railroad Adjustment Board evidenced an election of inconsistent remedies in that it was an acceptance of one of the two means afforded by law for redress for any grievances or claim arising out of the alleged unjustified discharge of the then claimant, now appellant, Michel.

“There would seem to be no occasion here for any detailed discussion of the purpose and effect of the Railway Labor Act, 45 U. S. C. A. Section 151, et

seq. This subject has received exhaustive consideration in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; *Id.*, 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928; *Washington Terminal Co. v. Boswell*, 75 U. S. App. D. C. 1, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, and others which could be mentioned. Suffice it here to say that Congress provided procedure whereby the carriers and their employees might obtain a speedy and just determination of grievances by a body recognized as qualified by experience to settle such disputes by a hearing, which even if informal from the judicial standpoint, nevertheless affords opportunity for presentation and determination of claims by the application of rules and principles developed by experience and well understood by carriers, their employees, and union representatives. Further reference to *Slocum v. Delaware, L. & W. R. Co.*, *supra*, *Order of Ry. Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, and the *Burley* case, *supra*, manifest the important and significant role of the National Railroad Adjustment Board in effectuating the congressional intent to provide means for the effective settlement of disputes between carriers and their employees. There is, however, no requirement that an employee so prosecute his claim for relief for breach of an employment agreement before the Adjustment Board. He may proceed in the first instance by suit in the Courts to recover damages for breach of the contract. *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, and as further discussed in *Slocum v. Delaware, L. & W. R. Co.*, *supra*. However, when there is a voluntary election to proceed

in the manner provided by the Railway Labor Act, 45 U. S. C. A. Sec. 151 et seq., supra, and the claim pursued to a determination of the merits by the Adjustment Board, this procedure by both right and reason represents an election of remedies which bars the independent suit which was otherwise available to the claimant.

“* * * In any event, it can not be questioned that by the Act Congress has established a forum for the settlement of such disputes to which the employee may resort if he so desires. Consequently, there would appear no reason for not enforcing in such instances the fundamental principle that where one of two inconsistent remedies are available, the election of one precludes recourse to the other. This has been the uniform holdings, correctly we think of the Courts which have considered this question. It follows, therefore, that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim.”

Since the Supreme Court denied Certiorari in this case, its action must necessarily be construed as an affirmation of the opinion of the Fifth Circuit Court of Appeals, and approval of the summary judgment granted by the District Court.

Finally, the United States Supreme Court construed the provisions of the Railway Labor Act in an opinion filed June 1, 1953, in the case of *Transcontinental & West*.

Air v. Koppal, 345 U. S. 653, 97 L. Ed. 1326. In this case plaintiff was an employee of an air carrier subject to Title II of the Railway Labor Act. He was discharged after a hearing but did not appeal this discharge to company officials, as required by the terms of his employment contract. Koppal filed suit in a District Court and recovered a jury verdict, which was set aside by the Court, and judgment entered for the defendant carrier upon the ground that Koppal had not exhausted the administrative remedy in his contract by appeal provided in the contract, as required by Missouri law. The United States Court of Appeals for the Eighth Circuit, reversed the judgment (199 F. 2d 117), whereupon the United States Supreme Court granted Certiorari, "Because of differing opinions expressed as to the effect of our decisions in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, and *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577, and due to the importance of the case in relation to the Railway Labor Act."

The judgment of the Court of Appeals was reversed, and the judgment of the District Court for the defendant was affirmed.

After quoting from its opinions in the *Moore* and *Slocum* cases, the court then stated:

"The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the *Slocum* Case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures pre-

scribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, *supra*, under Mississippi law.

“On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so.”

Analysis of the foregoing decisions leads to the following conclusions:

(1) The National Railroad Adjustment Board has exclusive jurisdiction to determine disputes between unions, or between a union and the carrier, of the type involved in the *Slocum* case, requiring an interpretation of a collective agreement. An action for a declaratory judgment will not lie, and courts have no jurisdiction to consider such a dispute. (*Washington Terminal Co. v. Boswell*, 124 F. 2d 235, Affirmed 319 U. S. 732, 87 L. Ed. 1694; *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 90 L. Ed. 318; *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 94 L. Ed. 796; *Order of R. C. of A. v. Southern R. Co.*, 339 U. S. 255, 94 L. Ed. 811.)

(2) In cases of individual grievances, a discharged employee has an administrative remedy, under the Act, which he may pursue before the Board. It is not necessary for him to resort to this administrative remedy before commencing a court action for wrongful discharge, if the state law permits such an action. (*Moore v. Illinois Central Railroad Company*, 312 U. S. 630, 85 L. Ed. 1089;

Transcontinental & West. Air v. Koppal, 345 U. S. 653, 97 L. Ed. 1326.)

(3) A discharged employee has an election, either to pursue his administrative remedy before the Board, or commence a court action for wrongful discharge. He may not do both. (*Michel v. Louisville & N. R. Co.*, 188 F. 2d 224, cert. den. 342 U. S. 862, 96 L. Ed. 648; *Transcontinental & West. Air v. Koppal*, 345 U. S. 653, 97 L. Ed. 1326.)

(4) Where the state law requires one to exhaust his administrative remedy provided in a contract before commencing a court action for breach of contract, a discharged carrier employee must do so, if his employment contract so provides. (*Transcontinental & West. Air v. Koppal*, 345 U. S. 653, 97 L. Ed. 1326.)

(5) A discharged employee is not bound by representation by his union before the Board, unless he has authorized such representation, either directly or indirectly, or by virtue of the Constitution and by-laws of his union, or by some other legally sufficient manner. He may not, however, stand by with knowledge or notice of what is going on between a carrier and his union, or before the Board on a submission of his claim by his union, allow his claim to be thrashed out to a conclusion, and then attempt to assert his individual rights by a court action. (*Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

(6) Awards of the National Railroad Adjustment Board are final and binding on both parties, except as to money damages. (*Washington Terminal Co. v. Boswell*, 124 F. 2d 235, Affirmed 319 U. S. 732, 87 L. Ed. 1694; *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

(7) Where the validity of an award by the Board is questioned in an appropriate proceeding before the courts, such award is nevertheless entitled to presumptive weight and one who would upset it carries the burden of showing that it was wrong. (*Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 89 L. Ed. 1886; re-argued 327 U. S. 661, 90 L. Ed. 928.)

Not only is an award entitled to presumptive weight as to its validity and regularity in the proceedings leading up to such an award, but courts will not review an award unless specific issues are presented in the pleadings or in the record attacking the validity of the award upon some basis amounting to a denial of due process of law. This will be discussed in the cases which follow.

Appellant has misconstrued the purport of the Supreme Court decisions referred to in his brief. Although Appellant asserts at page 7 of his brief that the Supreme Court has not had occasion to flatly rule with respect to the "finality" provision in a wrongful discharge case which has been determined by the Board, a reading of the foregoing decisions will disclose that the Supreme Court has repeatedly construed the jurisdiction of the Board and ruled on the "finality" provision in the Act. The Supreme Court in both the *Elgin* cases and the *Washington Terminal Co.* case expressly construed the effect of Section 153 First (m) of the Railway Labor Act (*supra*). Although the *Elgin* cases were decided upon questioned authorization of the Union to act for the plaintiffs, and the *Washington Terminal Co.* case was an action for a declaratory judgment, the Supreme Court necessarily construed Section 153 First (m) of the Railway Labor Act, and the final and binding effect thereof. The *Slocum* case, cited by Appellant, was not a wrongful discharge case but

rather was an action for a declaratory judgment seeking an interpretation of two collective agreements. These are the three cases relied upon most heavily by the Appellant (Appellant's Br. pp. 7-16), although none of them involved an alleged wrongful discharge, as in the instant case. However, rather than support the argument of the Appellant, these cases support the position of the Appellee. The conclusion that these Supreme Court decisions are contrary to the argument of Appellant is made even more apparent by the denial of Certiorari by the Supreme Court in the *Michel* case, and the opinion of the Supreme Court in the *Transcontinental & West. Air* case.

Other courts which have had occasion to decide wrongful discharge cases under fact situations identical with or similar to the record before this court have had no difficulty in applying the foregoing decisions. It has not been necessary for these courts to theorize or conjecture about the possible effect of the dissenting opinion written by Circuit Justice Stephens in the *Washington Terminal Co.* case, as Appellant did on pages 11-13 of Appellant's brief. Justice Stephens' dissenting opinion, in a case seeking a declaratory judgment, has never been followed by any court in a wrongful discharge case. The *Moore* case, 312 U. S. 630, 85 L. Ed. 1089, in effect, holds that if the state law permits a common law or a statutory action for breach of an employment contract, the employee has an election of remedies and the procedure outlined in the Railway Labor Act for settlement of grievances is not an exclusive remedy for alleged wrongful discharge. (*Washington Terminal Co. v. Boswell* (1941), 124 F. 2d 235, affirmed (1942), 319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694; *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 89 L. Ed. 1886; *Elgin, Joliet & Eastern R. Co. v. Burley* (1946), 327 U. S. 661, 90 L. Ed. 928;

Adams v. N. Y. C. & St. L. R. Co. (1941), 121 F. 2d 808; *T. W. A. v. Koppal* (1953), 345 U. S. 653, 97 L. Ed. 1326; *O. R. C. v. Southern R. Co.* (1950), 339 U. S. 255, 94 L. Ed. 811; *Michel v. L. & N. R. Co.* (1951), 188 F. 2d 224, cert. den. Oct. 22, 1951, 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648.)

The existence of an election of remedies for the employee does not establish a duality of remedies. The remedy provided by the Act, and a court action, are mutually exclusive. The employee may proceed either in accordance with the administrative procedure provided in his employment contract, with successive appeals up to and including the National Railroad Adjustment Board, or he may resort to his action at law for alleged unlawful discharge, if the state law permits such a claim. Once the election of remedies is made by the employee to proceed to an administrative determination under his contract before the National Railroad Adjustment Board, he may not thereafter disregard the finality of the decision and award by the Board and resort to court action. The courts have uniformly granted motions for summary judgment in behalf of a defendant carrier where an employee seeks judicial relief after having received an adverse award from the National Railroad Adjustment Board. This has been true whether the court action was simply for wrongful discharge (as in the instant case), or was an action to set aside the award of the Board, or an action seeking a judicial review of the Board's award, or a combination of all of these forms of relief. (*Michel v. L. & N. R. Co.* (1951), 188 F. 2d 224, cert. den. Oct. 22, 1951, 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648; *T. W. A. v. Koppal* (1953), 345 U. S. 653, 97 L. Ed. 1326; *Berryman v. Pullman Co.* (1942), 48 Fed. Supp. 542; *Kelly v. N. C.*

& *St. L. Ry. Co.* (1948), 75 Fed. Supp. 737; *Ramsey v. C. & O. R. Co.* (1948), 75 Fed. Supp. 740; *Hecox v. Pullman Co.* (1949), 85 Fed. Supp. 34; *Reynolds v. D. & R. G. W. R. Co.* (1949), 174 F. 2d 673; *Futhey v. A. T. & S. F. Ry. Co.* (1951), 96 Fed. Supp. 864; *Parker v. I. C. Ry. Co.* (1952), 108 Fed. Supp. 186; *Greenwood v. A. T. & S. F. Ry. Co.* (1954), 129 Fed. Supp. 105; *Majors v. Thompson* (5th Cir., decided June 30, 1956), 235 F. 2d 449; *Ellerd v. Southern Pacific Railroad Co.* (7th C. C. A., Mar. 1, 1957), 241 F. 2d 541.)

In *Berryman v. Pullman Co.*, 48 Fed. Supp. 542, decided November 6, 1942, plaintiff was employed by defendant as a pullman porter and was discharged for insubordination and neglect of duty. Plaintiff, through his brotherhood, processed a claim for reinstatement and back wages with company officials, following which plaintiff presented his claim to the National Railroad Adjustment Board. The Board found that the evidence disclosed no grounds for disturbing the action and denied plaintiff's claim. Plaintiff then filed this suit for wrongful discharge, seeking damages and reinstatement. Defendant moved for summary judgment, supporting said motion by affidavit, copy of the employment agreement, and certified copy of the award of the Board. Summary judgment for defendant was granted.

"There was no denial whatever of the facts stated in this affidavit and no request for a hearing for the purpose of offering parol evidence. The facts alleged in the affidavit therefore stand admitted.

"Defendant's position is that the controversy has been finally settled by the award of the National Railroad Adjustment Board.

“The Award of the Adjustment Board contained no money award. It did determine that plaintiff was discharged because of and as a result of his own misbehavior. That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts. But by the present action plaintiff seeks to have the Court do just that. He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it.”

Kelly v. Nashville, Chattanooga & St. Louis Ry., 75 Fed. Supp. 737, decided January 15, 1948, involved the discharge of plaintiff by defendant as a locomotive engineer for alleged misconduct. Company officials affirmed the discharge, and plaintiff then submitted through his brotherhood his grievance to the National Railroad Adjustment Board. Prior to a decision by the Board, plaintiff commenced this action for wrongful discharge. Defendant showed plaintiff's submission to the Board, and then moved for summary judgment. Summary judgment was granted, the Court stating as follows:

“The Railway Labor Act is one of optional remedies. An employee may take advantage of this remedy or may go to court. Should he voluntarily seek relief under the Act, he thereby is obligated to abide by its terms in the same manner as if he had contracted so to do.

“If one who is aggrieved and entitled to the benefits of the Act places his grievance for adjudication by the Adjustment Board upon merit, his voluntary action thereby fixes exclusive jurisdiction. In other words, such person may take the remedies provided by the Act, or he may bring his suit in a court. He cannot do both. The award of the Board and the judgment of a court are equally final.”

In *Ramsey v. Chesapeake & O. R. Co.*, 75 Fed. Supp. 740, decided February 18, 1948, plaintiff was discharged by defendant, and thereafter submitted a claim for reinstatement, alleging that his discharge was wrongful, which was processed to final award before the National Railroad Adjustment Board. The Board denied plaintiff's claim, whereupon plaintiff filed this action. Defendant moved for summary judgment, which was granted, even though plaintiff contended there were issues presented in the present case which were not considered by the Board. After citing the Board's findings that it had jurisdiction "over the dispute involved herein," the court stated:

"Reference to the statements referred to in the submission to the National Railroad Adjustment Board indicates that all of the grievances of the plaintiff were presented to the Board, although the Board in its opinion does not seem to have made specific findings upon all the facts involved.

"It would seem that, having presented his grievances to the Board, the plaintiff was bound by its decision under the language of Sec. 153, subd. 1(m) (of the Railway Labor Act).

"This seems to be in accord with the general law on the subject of *res judicata*: 'The general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided.' (Citing cases.)"

Hecox v. Pullman Co., 85 Fed. Supp. 34, decided March 19, 1949, was very similar to the *Berryman* case. The plaintiff was discharged as a pullman porter for alleged mistreatment of a passenger. Plaintiff filed a claim for reinstatement with company officials and thereafter processed his claim before the National Railroad Adjustment

Board. The Board concluded that the evidence in the record disclosed no grounds for disturbing the discharge of the plaintiff by the defendant and denied plaintiff's claim. Plaintiff then filed an action for damages for wrongful discharge, or in the alternative for an order reinstating him as an employee. In granting a motion for summary judgment by the defendant, the court cited, with approval, the *Washington Terminal Co., Berryman, Kelly* and *Ramsey* cases.

Reynolds v. Denver & Rio Grande Western R. Co., 174 F. 2d 673, decided by the Tenth Circuit Court of Appeals May 2, 1949 (rehearing denied June 13, 1949), involved an engineer who was accused of failure to respond to a call. After an investigation and hearing plaintiff was dismissed. Plaintiff appealed his dismissal to the superintendent and general manager of the defendant, acting through plaintiff's brotherhood. Plaintiff then made a submission of his claim through his brotherhood to the Railroad Adjustment Board, which denied plaintiff's claim for reinstatement and back pay. Plaintiff then commenced an action for wrongful discharge asking for reinstatement and damages. The District Court granted summary judgment to the defendant, from which plaintiff appealed. The Tenth Circuit Court of Appeals affirmed summary judgment for the defendant.

After citing the provisions of Section 153 First (m) of the Railway Labor Act, the United States Court of Appeals said:

"It would seem that this language is clear and susceptible only of one construction, namely, that in cases other than where a money award is made the judgment of the Board is final and binding upon the parties thereto. This is the construction which has

been placed upon the provisions of the act by the courts which have considered this question.

“The decision by the Supreme Court in *Elgin, J. & E. R. Co.* case (footnote 2) turned upon whether a collective bargaining representative without other authority had statutory authority, under the Act, to compromise and settle accrued momentary claims of individual employees. Inherent in the case also was the broader contention that in any event an award by the Board was not a final award and was merely advisory. This contention was disposed of by the Supreme Court in the following language (325 U. S. 711, 65 S. Ct. 1288): ‘At the outset we put aside this broadest contention as inconsistent with the act’s terms, purposes and legislative history. Upon rehearing, 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928, Justice Rutledge, again speaking for the court, said: ‘We adhere to our decision rendered in the opinion filed after the first argument.’ * * * All that was decided in the *Moore* case was that the remedy of the Act was cumulative and not exclusive and that an employee could pursue his legal remedy in court without first exhausting the administrative provisions of the Act. We conclude that the adjudication by the Board in favor of the Railroad Company upholding the dismissal of the appellant is final and binding and may not be challenged by the appellant in this proceeding.”

In *Futhey v. Atchison, Topeka & Santa Fe Ry. Co., et al.*, 96 Fed. Supp. 864, decided January 26, 1951, the plaintiff, a locomotive engineer, had been adjudged of unsound mind. Later he was paroled, and subsequently by court order he was restored to the rights and privileges of a sane person. Plaintiff then requested the railroad

to reinstate him to his former employment, but this was refused. Plaintiff, through his brotherhood, made a submission of his claim to the National Railroad Adjustment Board, which made an award denying plaintiff's claim for reinstatement. Plaintiff then filed an action against the railroad and the Board on the ground that the award of the Board was contrary to fact and contrary to law because plaintiff's restoration to sanity was not considered, and praying the court to make an order vacating and setting aside the award and directing the Board to grant plaintiff a rehearing. The court granted motions to dismiss upon the ground that the court lacked jurisdiction to grant the relief prayed for because, under the provisions of Section 153, First (m) of the Railway Labor Act, awards of the Board are final and binding upon both parties, except insofar as they contain a money award.

Parker v. Illinois Central Railway Co., et al., 108 Fed. Supp. 186, decided in 1952, involved a petition to review and set aside an award of the National Railroad Adjustment Board. Plaintiff, a switchman and engine foreman was discharged for violation of operating rules. Plaintiff filed a grievance with his local lodge of the Brotherhood of Railroad Trainmen, requesting that he be reinstated with seniority unimpaired and paid for all time lost. Ultimately, plaintiff's claim was submitted by his brotherhood to the National Railroad Adjustment Board but the Board failed to agree upon an award because of a deadlock. Pursuant to the provisions of the Act, a referee was selected to sit with the Board and to make an award. The award suggested by the referee and adopted by the Board denied plaintiff's claim. Plaintiff then filed a complaint in four counts, one of which attacked the constitutionality of the Board proceedings. The others were based pri-

marily on the ground that the award was contrary to the law and the evidence. A summary judgment was granted to the defendant. The court stated that an award of the National Railroad Adjustment Board does not preclude a judicial review of the validity of the award if a proper issue thereon is presented to the court, such as was done in the case of *Dahlberg v. Pittsburg & L. E. R.*, 138 F. 2d 121, upon a complaint attacking the validity of the award. However, the court further stated:

“The award carries a presumption of validity and the plaintiff must affirmatively allege such defects as would render it invalid * * * since plaintiff has failed to allege facts, which if proved, would render the award invalid, and since the award itself outlines the findings of fact upon which it is based, the court cannot now review the board proceedings.”

It should be noted here that the instant case does not attack the validity of the Board's award; no issues are presented in the pleadings, or otherwise, concerning the regularity of the proceedings before the Board, and there is no question before this court affecting the validity of the Board's award.

Greenwood v. Atchison, Topeka and Santa Fe Ry Co., 129 Fed. Supp. 105, decided February 28, 1955, by the United States District Court for the Southern District of California, involved an injured employee who secured a recovery for his injury under the Federal Employer's Liability Act. Plaintiff was discharged by the defendant and thereafter submitted a claim for reinstatement through his brotherhood to the National Railroad Adjustment Board.

Following an adverse award, plaintiff commenced this action based upon two counts. The first count, based

upon the Federal Employer's Liability Act, was dismissed and is not material here. The second count was a common count for wrongful discharge in violation of the plaintiff's contract of employment. Defendant moved for summary judgment, and submitted in support of said motion the agreement, the record of proceedings before company officials, and the record of proceedings before the Board.

Motion for summary judgment was granted by Honorable Peirson M. Hall, District Judge for the Southern District of California, using these words:

"The question for decision is whether the plaintiff is precluded from maintaining the second cause of action for wrongful discharge in view of his election to pursue his remedies under the National Railway Labor Act.

"Under *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, the plaintiff need not have followed the administrative procedure set forth in the National Railway Labor Act, but could have filed his suit.

"Having voluntarily decided, however, to pursue his administrative remedy, under the terms of his contract and of the National Railway Labor Act, through to a final decision by the National Railroad Adjustment Board, the plaintiff is now precluded from maintaining his second cause of action.

"The National Railway Labor Act, 45 U. S. C. A. Sec. 153(1)(m), provides: 'A copy of the award shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as

they shall contain a money award.' Section 153(1) (p) sets forth the procedure for the review of such an award in the appropriate district court. But the within case is not a proceeding under that section. It is an independent cause of action for wrongful discharge."

Majors v. Thompson, 235 F. 2d 449, decided June 30, 1956, by the United States Circuit Court of Appeals for the Fifth Circuit, involved two actions which were consolidated and which had been commenced by two discharged railroad employees against the trustee of N. E., Texas and Mexico Railway Company, seeking back pay and reinstatement or in the alternative, damages for wrongful discharge. Plaintiffs had previously processed their claims to a final determination by the National Railroad Adjustment Board, which had denied said claims. The defendant filed motions to dismiss and for summary judgment in both actions. The District Judge dismissed the actions for failure to state a claim upon which relief could be granted, relying upon a prescriptive provision of the Louisiana Civil Code. An appeal was taken, whereupon the Court of Appeals reversed the judgment upon the ground stated by the district judge and directed that each of the complaints be dismissed for lack of jurisdiction. In its opinion the Fifth Circuit Court of Appeals stated:

"Where the employee has voluntarily applied to the board for reinstatement, an election of remedies has been made which bars the right to litigate before the courts a claim of damages for wrongful discharge (citing cases)."

Many cases have dealt with the question of court review of an award by the Board. The case of *Ellerd v. So. Pac. Railroad Co.* (7th C. C. A.), 241 F. 2d 541, decided March 1, 1957, is one of the most recent cases involving court review, and is cited because Appellant's Argument No. II, pages 17-26 of his brief, in effect, asks this court to review the evidence before the National Railroad Adjustment Board and reach a conclusion contrary to that of the Board. Ellerd was employed by defendant in the State of Arizona. He was discharged for physical disability. His Union presented a claim for reinstatement in his behalf which was denied by the Board. Plaintiff then commenced an action in the State of Arizona against the defendant carrier and the Board, in which he sought a review of his claim and requested the court to set aside the award of the Board. Plaintiff expressly claimed in his complaint that his Union was not authorized to represent him, that he had no knowledge of the proceedings before the Board, and that he had been deprived of valuable rights without due process of law. The District Court in Arizona dismissed the Board for lack of jurisdiction because it was not subject to process in Arizona, and granted summary judgment to the defendant carrier based upon the denial of plaintiff's claim by the Board. Plaintiff then commenced this action in the District Court of Illinois seeking to set aside the award of the Board, expressly alleging in his complaint lack of authorization of his union and lack of due process of law. Summary judgment was granted by the District Court in

Illinois upon the ground that the decision of the District Court in the State of Arizona was *res judicata*. Plaintiff then took an appeal to the Seventh Circuit Court of Appeals, which reversed the judgment and remanded the case for a determination of plaintiff's allegation that his brotherhood was not authorized to represent him before the Board. In its opinion, the Seventh Circuit Court of Appeals stated its construction of the statute, and various decisions, as follows:

“The statute itself, 45 U. S. C. A., Sec. 153(m) is, inter alia, as follows: ‘* * * the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.’ Under this act, in *Reynolds v. Denver & Rio Grande Western R. Co.*, 10 Cir., 174 F. 2d 673, the court held that the Act, where the order is not for a money award, clearly precludes judicial review. See also *Railroad Yardmasters of North American v. Pittsburg & L. E. R. Co.*, D. C. 39 F. Supp. 876. The Fifth Circuit, in *Estes v. Union Terminal Co.*, 89 F. 2d 768, decided that a court cannot set aside an order of the board, if all substantial rights have been fully protected. In *Sigfred v. Pan American World Airways*, 5 Cir., 230 F. 2d 13, the court declined to review rulings of the board in the absence of any question regarding jurisdiction of the board or regularity of its proceedings. See also *Switchman's Union of North America v. National Mediation Board*, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61; *Sadler v. Union Railroad Co.*, D. C., 125 F. Supp. 912. In *Pigott v. Detroit, Toleda & Irontown R. Co.*, 221 F. 2d 736, the Sixth Circuit held that the District Court was without jurisdiction to review a similar order, in view of the fact that there was no show-

ing that the plaintiffs had been denied due process of law. In *Hargis v. Wabash Railroad Co.*, 7 Cir., 163 F. 2d 608, we had before us the question of whether the court could review an order of the National Railroad Adjustment Board. A majority was of the opinion that the court was, in the absence of constitutional defects, without jurisdiction to do so, relying upon *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886.

“The sound conclusion to be drawn from the statute and the various decisions, seems to be that, in the absence of any question as to the regularity of proceedings before the board, for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board. If that body has jurisdiction and proceeds according to constitutional guarantees, its decision is, in the words of the statute, final.”

Again, it should be noted that Appellant's complaint is a simple action for wrongful discharge; that Appellant makes no claim that his Union was not authorized to represent him, or that the award of the Board is invalid, or that the award of the Board should be reviewed and set aside.

II.

An Award of the National Railroad Adjustment Board Is Not Only Final and Binding on the Parties, but Will Not Be Reviewed by the Courts in the Absence of Any Question as to the Regularity of Proceedings Before the Board Which Prevent Due Process of Law.

The Specification of Errors of the Appellant [R. 3] is extremely broad and does not specify wherein the District Court erred in granting summary judgment to the Appellee. Appellant's Brief, in support of this broad specification of errors, presents two arguments: (1) that decisions of the Board are not final and binding, and (2) that the award of the Board in the instant case was not on the merits. Appellant's first argument has already been answered by the cases heretofore cited in this brief. As to Appellant's second argument, Appellee earnestly insists that this court lacks jurisdiction to review the award of the Board because the record does not contain a single allegation attacking the validity of the award. No claim is made in the pleadings, or otherwise in the record or in Appellant's argument, that there were any defects of any kind whatsoever in the proceedings before the Board, or that there was any irregularity in such proceedings which would deprive Appellant of a fair hearing, or due process of law. (*Parker v. I. C. Ry. Co.*, 108 Fed. Supp. 186; *Berryman v. Pullman Co.*, 48 Fed. Supp. 542; *Kelly v. N. C. & St. L. Ry. Co.*, 75 Fed. Supp. 737; *Ramsey v. C. & O. R. Co.*, 75 Fed. Supp. 740; *Reynolds v. D. & R. G. W. R. Co.*, 174 F. 2d 673; *Michel v. L. & N. R. Co.*, 188 F. 2d 224, cert. den. 342 U. S. 862, 96 L. Ed. 648; *Ellerd v. Southern Pacific Railroad Co.*, 241 F. 2d 541.)

However, assuming for the sake of argument only, that the matter contained in pages 17-26 of Appellant's Brief is properly before this court for consideration, it is apparent from the record that Appellant has had a determination, on the merits, of the very question which Appellant says is "the heart of the matter" namely, did the Appellant do wrong in returning to Las Vegas? Appellant attempts to find fault with the language of the Board's award because it does not contain a specific finding as to each fact presented in the various submissions to the Board. It is noteworthy that in his Order granting summary judgment, Honorable John R. Ross, United States District Judge, found "from the pleadings, admissions, and affidavits on file that there is no genuine issue of any material fact and that the defendant is entitled to a judgment as a matter of law, and that such showing has not been successfully controverted by the plaintiff." Appellant did not request the District Court to make specific findings as to each fact presented to the court, nor does Appellant now complain that specific findings as to each fact were not made by the District Court. Such findings are no more necessary in awards of the Board than they are in orders of the court. Obviously, the findings of the District Court are sufficient to support summary judgment or Appellant would have included any defect therein in his specification of errors. It is equally obvious that the findings of the National Railroad Adjustment Board in its award [R. 56-59] are sufficient to support a denial of Appellant's claim, on the merits, and the Board was not required to submit specific findings on each fact presented in the submissions before it. (*Ramsey v. Chesapeake & O. R. Co.*, 75 Fed. Supp. 740.)

Appellant was specifically charged with violating two operating rules of the Appellee when he returned from Nipton, California, to Las Vegas, Nevada. At page 21 of Appellant's Brief, Appellant asserts that the heart of the matter to be investigated was whether or not Appellant did wrong in so returning. The Board in its award stated that "claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline" [R. 57]. The Board, therefore, made a specific finding on the "heart of the matter," as phrased by Appellant. After discussing Appellant's conduct in the investigation hearing, the Board in its award further stated:

"It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employee to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith." [R. 58.]

Appellant argues that the Board did not consider any provisions of the agreement nor even refer to them by indirection and that the merits of the controversy were not considered (Appellant's Br. p. 22). Yet, Appellant concedes at page 21 of his brief that the heart of the matter to be investigated was whether or not Appellant did wrong in returning from Nipton to Las Vegas; that a determination of this question would undoubtedly be a determination on the merits; and that this question was

presented by the submissions of the parties. Appellee contends that this question was not only considered by the Board but was decided adversely to the Appellant when the Board found that his violation of operating rules by returning to Las Vegas was insubordination and merited discipline. Appellant never doubted the effect of the Board's award. By letter dated July 1, 1952, by the then General Chairman of his brotherhood, he was forwarded a copy of the award, with this comment: "It is with the deepest regret that I note this award denies your case in its entirety" [R. 83]. Furthermore, Appellant acknowledged, in his letter dated December 5, 1952, to Mr. E. J. Connors [R. 63], that he knew his claim had been heard and denied by the Board. If Appellant had any doubt as to the effect of the denial, or whether the "merits of the controversy" had been considered, Appellant could have obtained an interpretation under the "finality" provision of the Act, Section 153 First (m), the last sentence of which reads as follows: "In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." However, Appellant did not seek an interpretation of the award. The only other question presented by Appellant in his submissions to the Board concerned compliance with the investigation rule provided in Article 33 of the agreement. This question was specifically decided by the Board, adversely to the Appellant [R. 58-59].

Thus, even if it be assumed that the fugitive issue found only in the second argument of Appellant's Brief is properly before this court for consideration, it is obvious that the Board determined such issue in its award; that such determination was on the merits, after a consideration

of voluminous material; and that the award of the Board denying Appellant's claim is final and binding upon the Appellant.

Conclusion.

This court, as well as other appellate tribunals, has often held that it must view the evidence most favorably to Appellees and draw all inferences fairly deducible from the facts in their favor. (*United States v. Aspinwall*, 96 F. 2d 867.)

Since awards of the National Railroad Adjustment Board are final and binding upon both parties, and since this court lacks jurisdiction to review the Board's award, Appellee respectfully submits that the order of the District Court granting summary judgment for the defendant should be affirmed.

Respectfully submitted,

E. E. BENNETT,

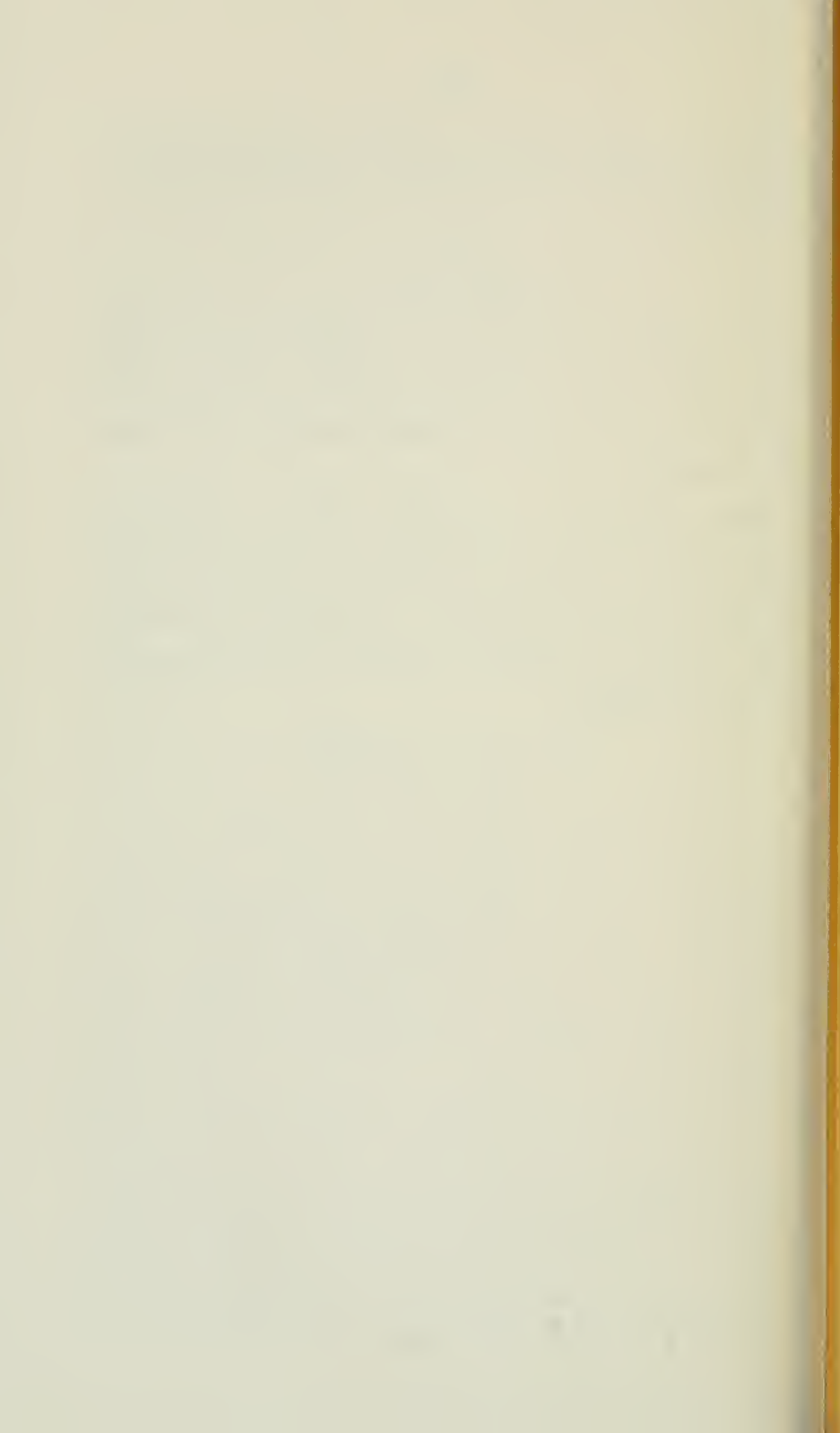
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No. 15649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,

Appellee.

PETITION FOR REHEARING.

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vs.

UNION PACIFIC RAILROAD COMPANY,

Appellee.

PETITION FOR REHEARING.

To the Honorable William Healy, Walter L. Pope, Frederick G. Hamley, United States Court of Appeals for the Ninth Circuit, San Francisco, California:

Appellee and defendant, Union Pacific Railroad Company, a corporation, respectfully petitions for a rehearing in the above-entitled action and alleges as grounds therefore the matters hereinafter discussed.

- (a) This petition is presented pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit.
- (b) The Court erred in concluding that the award of the National Railroad Adjustment Board was not an award on "the merits," but rather was a "plain misconstruction of Price's submission to the board." (Opinion, p. 5.)

- (c) The Court erred in concluding that the Board made no determination of the charge of insubordination against Price which resulted in his dismissal. In arriving at this conclusion, the majority opinion completely disregards the charges of insubordination investigated by the carrier on the property [Tr. 13], and also completely disregards the clear and unambiguous language of the Board which, after commenting on the result of such investigation, decided that "*This was insubordination and merited discipline.*" [Tr. 57.]
- (d) Although appellant did not seek a review of the Board's award, and although no issue concerning jurisdiction, notice, interpretation of award, validity of award, or due process of law is presented by the pleadings, or the Transcript on Appeal, or is otherwise before the court for review, the majority opinion nevertheless does review the award of the Board and reaches the factually erroneous conclusion that the Board denied only part of appellant's claim. This conclusion is contrary to the Board's award. Such review by the Court is contrary to the National Railway Labor Act, and court decisions construing the scope of court review of Board awards.
- (e) The majority opinion fails to apply the general law on the subject of *res judicata*, and reverses the long-accepted practice of this Court, as well as other appellate tribunals, of viewing the evidence most favorable to appellee, and drawing all inferences fairly deducible from the facts in favor of the appellee.

It should be emphasized that the claim presented to the Board by Price was for reinstatement with pay for all time lost and all seniority and other rights restored. In support of this claim, Price submitted an extensive *ex parte* submission to the Board containing many self-serving declarations and other material which would be objectionable in a court of law. This is one of the advantages afforded an employee in pursuing his administrative remedy under the Act, instead of seeking redress by court action. Appellant's submission to the Board was not hindered by any exclusionary tactics on the part of appellee, and it was conceded by appellant that his entire claim was fully presented to the Board for its determination. The Transcript of Record, pages 5-56, discloses that all of the matters set forth in appellant's complaint were presented to the Board for adjudication. It should be noted, and emphasized, that the submission of appellant's claim to the National Railroad Adjustment Board was initiated by the appellant, and not by the carrier. It is respectfully submitted that, having voluntarily sought an adjudication of his controversy by the Board, appellant may not now evade the effect of the Board's award by arguing that the Board did not consider both elements of his claim. It therefore is essential to examine appellant's claim, as alleged in the complaint on file herein.

Specifically, what did appellant assert in his complaint as a violation of the collective bargaining agreement of April 1, 1943? Appellee respectfully directs the Court's

attention to Paragraph V of appellant's complaint [Tr. 4] in which appellant alleges violation of the agreement in the following respects:

- (a) There was no thorough investigation made of the alleged faults on the part of plaintiff.
- (b) Plaintiff was not afforded an opportunity to have a trainman of his choice present at the investigation held.
- (c) Plaintiff was not afforded a reasonable opportunity to prepare his defense.
- (d) Plaintiff was not afforded a reasonable opportunity to present his defense at the said investigation.
- (e) Plaintiff was not present at the said investigation.
- (f) Plaintiff was not afforded an opportunity to have witnesses present in his behalf at the said investigation.
- (g) Plaintiff was denied the right to have witnesses present in his behalf at the said investigation at the expense of defendant.
- (h) Plaintiff was not afforded a reasonable opportunity to participate in his own defense at the said investigation.
- (i) Plaintiff was dismissed without cause.

It was conceded by appellant in his argument in the District Court, and before this Court, and it is assumed in the majority opinion of this Court, that each of the foregoing allegations in (a) through (h) was decided against the appellant in that portion of the Board's decision which discusses compliance with the investigation rule of the agreement. (Art. 33.) In addition to allegations (a) through (h), however, appellant also alleged in subparagraph "i" that he was dismissed without cause.

This claim, as well as the others alleged in the complaint, was presented to the Board in appellant's submission to the Board. There can be no doubt about appellant's disobedience of Operating Rules 700 and 702 of the company when he returned to Las Vegas, Nevada, from Nipton, California, contrary to express instructions to remain at Nipton. Appellant admits such return in his letter of July 27, 1949, to his local union in which he requested union action for his reinstatement. [Tr. 51.] Such admission is apparent throughout the submissions of appellant by his union on his behalf [Tr. 5-56], and appellant has never denied that he violated the Operating Rules in question. In this connection, it should also be emphasized that appellant submitted no counter-affidavits or denials in the District Court and made no request for a hearing for the purpose of offering parol evidence in opposition to the facts alleged in the affidavits and other evidence introduced by the appellee. All of such facts therefore stand admitted in the Record.

Appellant was charged with "violating Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting himself from duty without proper authority." [Tr. 13.] Appellant was discharged for violating these Operating Rules. [Employee's Ex. F, Tr. 32.] In the submission of his claim to the Board, appellant sought to justify such violation by reference to Section "b" of Article 32 of the Agreement, which is quoted in footnote 5 of the majority opinion. This attempted justification by appellant was in effect a plea of confession and avoidance, and appellee respectfully urges that the Board specifically decided that the confession was true but that the avoidance was without merit. It

is well settled that an employee who receives orders which he believes are in conflict with the agreement between his union and the carrier must nevertheless obey such orders, under penalty of dismissal, and later make such formal complaint as he believes to be justified.

The decision of the Board, after referring to the fact that a carrier must have employees who can be relied on to obey operating instructions and orders if it is to have efficient operation, states that "Claimant was found to have willfully disobeyed his orders." The majority opinion asserts that this finding was not made by the Board but rather by the superintendent of the railroad. The majority opinion further asserts that the Board neither found nor concluded that the railroad was entitled to discharge Price. Appellant strenuously disagrees with this statement in the majority opinion. Appellant urges that the Board by reference to and adoption of the same, approved and affirmed the finding that claimant willfully disobeyed orders. It is apparent that the majority opinion overlooks and completely disregards the language of the Board immediately following the foregoing quotation, because the very next sentence reads as follows: "This was insubordination and merited discipline." This is unquestionably language of the Board. It is not only a finding but is also a conclusion that Price was guilty of violating operating instructions, as charged in the investigation, and as found by the company, and that such violation was insubordination which merited discipline.

The word "discipline" is not an abstract term. It is taken from Article 33 of the Agreement dated April 1, 1943, and includes the dismissal of an employee. Paragraph (a) of said Article 33 provides that a transcript of the testimony of all witnesses will be furnished to the

general chairman upon request when "discipline" is administered. Paragraph (b) of said Article 33, which is integrated with paragraph (a), provides that if investigation, as provided in paragraph (a), results in *dismissal*, the case may be handled by the employee, or his representatives with the general manager of the carrier. Paragraph (c) of said Article 33 refers to reinstatement and provides that no reinstatement shall be made after two years from the date of dismissal unless the case is still under prosecution through regular channels or new evidence is secured. Appellee earnestly asserts that the Board made a specific finding of insubordination in violation of operating rules of the company, and found and concluded that such insubordination merited discipline which, under the terms of the agreement, includes "dismissal." The decision of the Board therefore completely disposes of appellant's claim of wrongful dismissal, as well as his complaint against the procedure followed under the investigation rule of the agreement. Appellee repeats the assertion that the Board decided appellant's *entire* claim against the appellant.

The Board's award was in these words: "Claim denied." The claim, which was denied, was for reinstatement with full pay and all rights restored. Appellant supported this claim before the Board by alleging wrongful dismissal, and dismissal in violation of the investigation rule of the agreement. The entire claim of appellant was denied by the Board. The majority opinion recognizes this fact at page 3 in these words: "The Board issued an award denying Price's claim in its *entirety*." (Emphasis supplied.) However, after stating the foregoing correct fact, the majority opinion then erroneously decides that only a part of appellant's claim was denied

by the Board. In order to reach this conclusion, the majority opinion misconstrues certain language of the Board reading as follows: "The only question for review is whether there was substantial compliance with the investigation rule," and completely ignores other language of the Board reading as follows: "*This was insubordination and merited discipline.*" In fact, the last-quoted sentence, which occurs first in the decision of the Board, is the foundation for the language emphasized in the majority opinion to the effect that the only question for review is whether there was substantial compliance with the investigation rule. Both statements by the Board must be given equal weight and it therefore necessarily follows that, having concluded that appellant was guilty of insubordination and deserved discipline, the only *remaining* question to be reviewed and commented on by the Board was whether or not there was substantial compliance with the investigation rule of the agreement.

The majority opinion correctly states that "Price did not seek a review of the Board award." Notwithstanding this correct statement, the majority of the Court proceeded to review the Board's award and undertook to construe it and interpret it, even though the Court, in keeping with Section 153, First (m), of the Railway Labor Act, and decisions construing said Act, concluded that awards of the Board are final and binding upon both parties to the dispute, except insofar as they shall contain a money award. Neither appellant nor his union ever doubted at any time that his claims had been denied in its entirety. On December 5, 1952, appellant wrote a letter to Mr. E. J. Connors [Tr. 63] requesting the company to give further consideration to his claim for reinstatement "after my claim has been heard and denied

by the Railroad Adjustment Board.” If appellant had contended that the Board’s denial did not decide his claim on the merits, either party could have sought an interpretation of the award in the light of such dispute and the Board would have been required to give such interpretation. (National Railway Labor Act, Sec. 153, Subd. First (m), cited in footnote 6 in this Court’s opinion.)

Appellee again emphasizes the fact that appellant voluntarily sought the jurisdiction of the Board for an adjudication of his claim. Such jurisdiction, when voluntarily sought, as in the instant case, is exclusive under all of the decisions where this question has been raised.

“If one who is aggrieved and entitled to the benefits of the Act places his grievance for adjudication by the Adjustment Board upon merit, his voluntary action thereby fixes *exclusive* jurisdiction (emphasis supplied). In other words, such person may take the remedies provided by the Act, or he may bring his suit in court. He cannot do both. The award of the Board and the judgment of a court are equally final.” (*Kelly v. Nashville, Chattanooga & St. Louis Ry.*, 75 Fed. Supp. 737.) The ruling in this case is especially significant because the plaintiff, through his union, had submitted a claim of wrongful discharge to the Board, but thereafter commenced his court action prior to a decision by the Board. Summary judgment was granted to the carrier, solely upon the basis of exclusive jurisdiction, even though there had been no decision by the Board, and therefore no final determination of the controversy on the merits.

The majority opinion ignores the general law of *res judicata* and its application to Board decisions. This general law is stated very clearly in the wrongful dis-

charge case of *Ramsey v. Chesapeake & O. R. Co.*, decided February 18, 1948, 75 Fed. Supp. 740 at 742. Summary judgment was granted to the carrier notwithstanding Ramsey's argument that the Board had not made specific findings upon all of the facts and issues involved, and his further argument that there were issues in his court case which had not been presented to the Board in his submission. After citing the Board's finding that it had jurisdiction over the dispute and the parties, the Court then stated:

"Reference to the statements referred to in the submission to the National Railroad Adjustment Board indicates that all of the grievances of the plaintiff were presented to the Board, although the Board in its opinion does not seem to have made specific findings upon all the facts involved.

"It would seem that, having presented his grievances to the Board, the plaintiff was bound by its decision under the language of Sec. 153, subd. 1 (m) (of the Railway Labor Act).

"This seems to be in accord with the general law on the subject of *res judicata*: 'The general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided.' *Covington & Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233; *City of Cincinnati v. Emerson*, 57 Ohio St. 132, 48 N. E. 667; *Northern Pacific Ry. Co. v. Slaughter*, 205 U. S. 122, 130, 27 S. Ct. 442, 51 L. Ed. 738. *Bolles v. Toledo Trust Co.*, 1940, 136 Ohio St. 517, 520, 27 N. E. 2d 145, 147."

In the *Ramsey* case, even though the Board did not, in its decision, make specific findings upon all of the facts or issues, the Court nevertheless concluded that the award

of the Board was final and binding, not only as to all issues which were presented to the Board, but also as to all issues which could have been raised and decided. This case is cited as stating the correct rule in *Barnett v. Penn.-Reading Seashore Lines*, 245 F. 2d 579 (C. A. 3rd, 1957).

The doctrine of *res judicata* in such cases is emphasized in 30 American Jurisprudence, Judgments, Section 339, reading as follows:

“A judgment is essential to the operation of the doctrine of *res judicata*. * * * However, the fact that a judgment is rendered without an opinion does not preclude its operation as an estoppel as to particular issues involved in the action, and it has been held that a trial court’s judgment is nonetheless *res judicata* of issues involved because rendered without a statement of findings of fact and conclusions of law.”

In other words, with respect to the doctrine of *res judicata*, the principal questions are: (1) What did the tribunal (whether Board or Court) have before it for decision? (2) What was decided by such decision? The fact that a decision of a court or Board does not comment upon, or attempt to decide, each and every fact or issue does not affect the doctrine of *res judicata*. It is the judgment itself which is important and to which the doctrine of *res judicata* attaches. The basic and controlling question is not “what phrasing, sentencing or paragraphing did the tribunal use in its opinion,” but rather it is “what did the tribunal do by its decision?”

The rule that an issue must actually have been litigated and determined does not mean that a person relying upon the judgment must probe the mind of the judge or in-

vade the jury room to ascertain the processes by which the result was reached, or that a court may speculate on what occurs in the recesses of judicial contemplation. (*St. Lo Constr. Co. v. Koenigsberger*, 84 App. D. C. 319, 174 F. 2d 25, 10 A. L. R. 2d 349, cert. den. 338 U. S. 821, 94 L. Ed. 498, 70 S. Ct. 66.)

The Railway Labor Act was enacted for the benefit of both employees and carriers. In the event of a dispute between an employee and his carrier, *either party* may invoke the jurisdiction of the Board (Sec. 153, First (i)) and thereby secure a speedy determination of the controversy. As was said in *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224, cert. den. 342 U. S. 862, 72 S. Ct. 87, 96 L. Ed. 648: "Suffice it here to say that Congress provided procedure whereby the carriers and their employees might obtain a speedy and just determination of grievances by a body recognized as qualified by experience to settle such disputes by a hearing, which even if informal from the judicial standpoint, nevertheless affords opportunity for presentation and determination of claims by the application of rules and principles developed by experience and well understood by carriers, their employees, and union representatives." Under the majority opinion, appellee will be forced to relitigate a dispute which is now nine (9) years old. A brief reference to the facts set out in the majority opinion will disclose that appellant was discharged in July, 1949. He submitted his claim to the Board in January, 1951. The Board denied his claim in its entirety in June, 1952. If appellee is now forced to relitigate this same dispute, its rights under the Railway Labor Act will have been abrogated, and Section 153, First (i) of the Act, affording *either party* the right of Board decision, will become a nullity

as far as carriers are concerned. Appellee respectfully submits that it has a right to rely upon the Board decision, not only under the doctrine of *res judicata*, but also under the finality provision of the Railway Labor Act, and that the trial court did not have jurisdiction to entertain this action for damages.

Finally, appellee refers the Court to its often-cited opinion in the case of *United States v. Aspinwall*, 96 F. 2d 867, which is in accord with similar decisions of other appellate courts, and holds that an appellate court must view the evidence most favorable to appellees and draw all inferences fairly deducible from the facts in their favor.

Here the uncontroverted facts are that appellant was discharged for violation of operating rules; that he submitted his entire claim to the National Railroad Adjustment Board, and that his claim was denied in its entirety.

Appellee respectfully requests a rehearing and suggests that such rehearing, if granted, be submitted to the Chief Judge for a determination of whether the rehearing shall be *en banc*.

Respectfully submitted,

E. E. BENNETT,

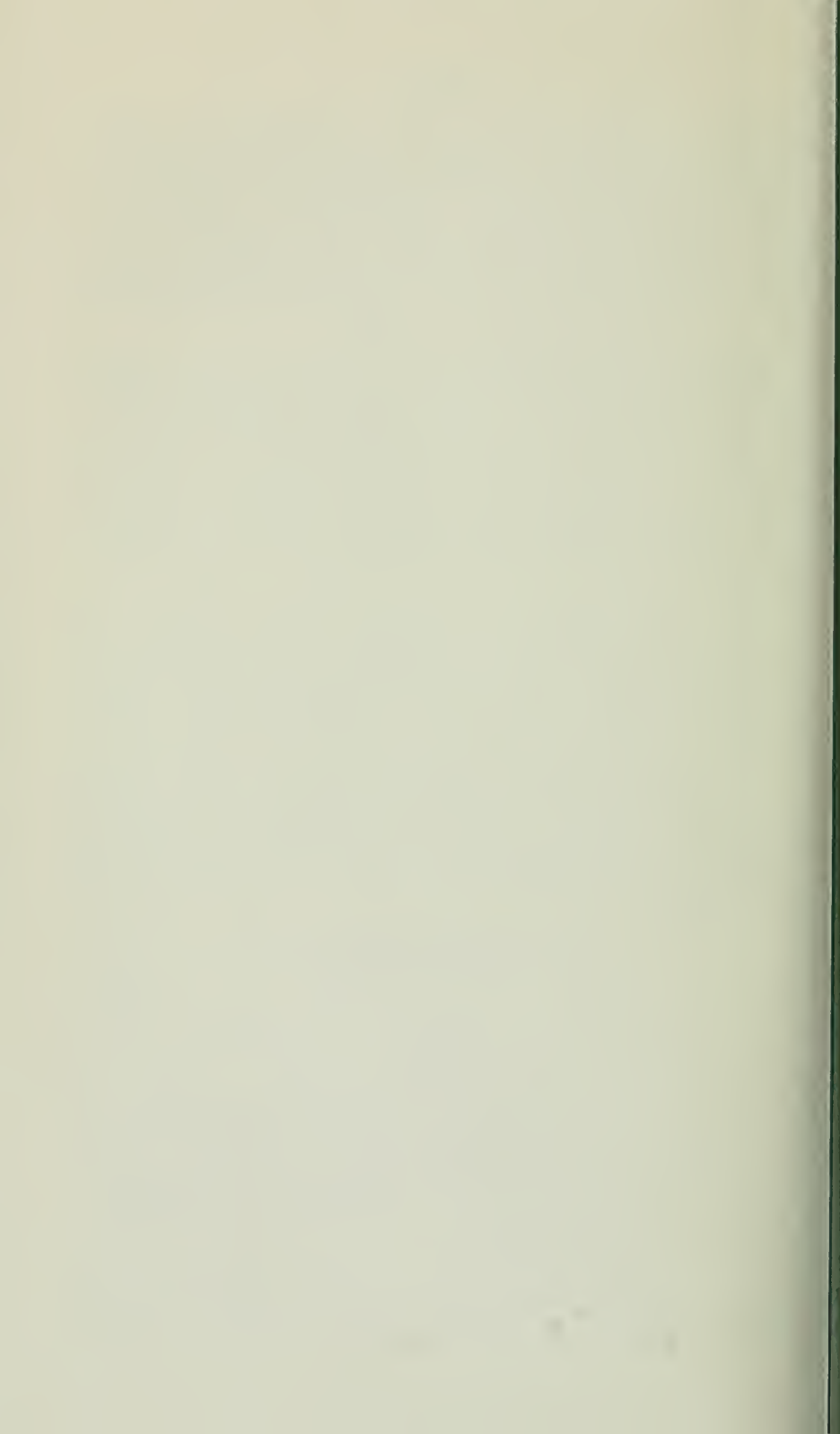
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No. 15649.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S BRIEF.

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District of Nevada.

APPELLANT'S BRIEF.

Jurisdiction.

Jurisdiction of the District Court in this case is based on diversity of citizenship (28 U. S. C. A. 1332). It was alleged in the Complaint [R. 3] that plaintiff was a citizen of the State of Nevada and defendant was a Utah corporation.

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U. S. C. A. 1291), and the timely invocation, by Appellant, of the prescribed procedure [Rule 73, Fed. Rules Civ. Proc.; R. 94-98].

Statement of the Case.

On July 12, 1949, Appellant was a railroad trainman employed by Appellee in Las Vegas, Nevada. On July 16, 1949, he was notified to report for a hearing the following morning at ten o'clock at the office of the Assistant Superintendent in Las Vegas for investigation and hearing on charges that he failed to protect his assignment as a swing brakeman at Nipton, California, on June 12, 1949, when he returned from Nipton to Las Vegas without authority to eat, in violation of certain operating rules [R. 13].

He appeared and requested a postponement so that he could have his representative, the local chairman of his brotherhood [R. 7] present [R. 14]. A postponement until 9:30 the following morning was granted [R. 14]. He then requested a further postponement on the ground that his representative was still not available, and was advised by the Chief Clerk to the Assistant Superintendent that the hearing would be deferred until 2:30 that day, and to get another representative [R. 16].

Appellant did not appear at 2:30 and a hearing was conducted in his absence by the Assistant Superintendent and the trainmaster [R. 12-29]. As a result of the hearing, he was discharged by the defendant [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the defendant refused reinstatement on such basis [R. 29-37].

Subsequently, Appellant's brotherhood submitted a claim in his behalf for similar relief to the National Railroad

Adjustment Board [R. 5-41], and after defendant had made its submission to the board, the brotherhood submitted a rebuttal thereto [R. 42-56]. On June 25, 1952, the board denied the claim, and although the brotherhood had argued in its submission and rebuttal that Appellant broke no rules in returning from Nipton to Las Vegas for food, and that under the collective bargaining agreement the Appellee had no right to have Appellant tied up at Nipton without eating facilities [R. 9-10, 42-45], the board made no findings or comment with respect to the matter [R. 56-59].

On June 6, 1955, Appellant filed a Complaint in the District Court, alleging that he was wrongfully dismissed as a trainman by Appellee in violation of the provisions of a collective bargaining agreement, and prayed for money damages [R. 35]. Appellee denied the allegations of the Complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. Appellee moved for summary judgment, which motion was denied after argument. Thereafter, Appellee moved for leave to move for summary judgment and for summary judgment [R. 85-90]. After argument thereon, the District Court granted Appellee's motion [R. 94].

Specification of Errors.

1. The Court below erred in holding that the denial of Appellant's claim by the National Railroad Adjustment Board entitled the Appellee to summary judgment.

Summary of Argument.

The Supreme Court of the United States has held that there is nothing in the Railway Labor Act which takes away from the courts jurisdiction to determine a controversy over the wrongful discharge of a railroad employee in violation of the provisions of a collective bargaining agreement. *Moore v. Illinois Central R.R.*, 312 U. S. 630. However, some courts have nevertheless held that by reason of Section 3 First (m) of the Act (45 U. S. C. A. 153), which provides that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to a dispute except insofar as they shall contain a money award," if the board determines a wrongful discharge case on the merits, adverse to the employee, he cannot sue in court for damages for such discharge.

The Supreme Court has not definitely ruled on the issue, having expressly reserved the same on two occasions. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 718; *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 244.

In *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, the leading case on the subject, and in which a carrier sought declaratory relief after an adverse board ruling, the majority implied that if an award by the board against a discharged employee was held to be final, Section 3 First (m) might be invalid. The dissent held, after reviewing the legislative history of the Act, and examining the implications of a construction of finality, that

Congress did not intend an award of the board to preclude subsequent resort to the courts, and that if it had such effect it would result in the taking of contract rights without due process of law. The *Washington Terminal* case was affirmed by an equally divided Supreme Court. 319 U. S. 732.

However, even if we assumed that the section should be construed so as to accord "finality" to a board determination that an employee was not discharged contrary to the provisions of the collective agreement, "finality" does not accrue unless there is a board determination on the merits.

In Appellants' case, the merits of the controversy were whether or not he was justified in returning from Nipton to Las Vegas for the purpose of eating, he having been tied up at Nipton where there were no eating facilities, in direct violation of the specific terms of Article 32 of the collective agreement. As the board made no determination whatsoever on this issue, or for that matter on any of the other issues with respect to contract violation by the Appellee, although they were specifically raised, the award of the board is not entitled to "finality" and under *Moore v. Illinois R.R.*, *supra*, Appellant could treat his discharge as final and sue for damages for wrongful discharge.

ARGUMENT.

I.

A Determination by the National Railroad Adjustment Board That a Railroad Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement Does Not Preclude the Employee From Suing in Court for Damages for Wrongful Discharge.

In *Moore v. Illinois Central R.R.* (1941), 312 U. S. 630, 634, 85 L. Ed. 1089, the carrier contended that the plaintiff employee could not bring an action for wrongful discharge in a state court until he had first presented his case to the National Railroad Adjustment Board, established under the Railway Labor Act (45 U. S. C. A. 153). In striking down this contention, the Supreme Court said:

“ . . . we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . . ”

Despite the clear language of the *Moore* decision, lower courts have held that if a discharged railroad employee submits his claim to the board on merit, and the board makes a determination adverse to him, there is an election of remedies, and he is barred from bringing an independent court action, *i.e.*, *Kelly v. N. C. & St. Louis Ry. Co.*, 75 Fed. Supp. 737; *Michel v. Louisville & N. R. Co.* (C. A. 5), 188 F. 2d 224. The decisions of these lower courts are based upon Section 3 First (m) of the Railway Labor Act (45 U. S. C. A. 153), which provides that the awards of the boards “shall be final and binding upon both parties to a dispute, except insofar as they shall contain a money award.”

The United States Supreme Court has not had occasion to flatly rule with respect to the effect of the "finality" provision in a wrongful discharge case which has been determined by the board. In *Elgin, Joliet & Eastern R. Co. v. Burley* (1945), 325 U. S. 711, 718, 89 L. Ed. 1886, the Supreme Court said:

"The validity and conclusive effect of the award were challenged also upon other grounds, among them . . . that since the award denied a claim for money damages, it was within the exception of Section 3 First (m), which provides that 'the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award,' and therefore did not preclude this suit; and that the Act, if construed to make the award conclusive, would violate the Fifth Amendment's due process provision by denying judicial review to defeated employees, although allowing it to defeated employers. Cf. § 3 First (p), (q); *Washington Terminal Co. v. Boswell*, 75 App. D.C. 1, 124 F. (2d) 235, affirmed by an equally divided Court, 319 U. S. 732, 87 L. Ed. 1694, 63 S. Ct. 1430."

". . . the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed. Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. . . ."

As the Court remanded the case for further proceedings to determine whether or not the employees authorized the submission of their claim to the board, it deemed it unnecessary to construe Section 3 First (m). And in

Slocum v. Delaware, L. & W. R. Co. (1950), 339 U. S. 239, 244, 94 L. Ed. 795, the Supreme Court took pains to reserve the question presented by the instant case:

“ . . . Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.”

Washington Terminal Co. v. Boswell (App. D. C., 1941), 124 F. 2d 235, affirmed by an equally divided Supreme Court 319 U. S. 732, 87 L. Ed. 1694, and cited by the Supreme Court in *Elgin, Joliet & Eastern R. Co. v. Burley*, *supra*, is undoubtedly the leading case on the finality provision. The majority decision was written by the late Justice Rutledge, who later wrote the opinion in the *Elgin* case.

In the *Washington Terminal* case, employees had submitted their claim to the board and the carrier appeared and made a full submission on the merits. The board made an award in favor of the employees, who were members of two unions, holding that under their collective bargaining agreement they were entitled to do the work previously done by others. The board ordered the carrier to make the award effective within thirty days. The carrier did not comply, and thereafter filed suit for declaratory relief, seeking adjudication of its rights under the agreement, including whether the agreement, if rightly interpreted, gave the employees the right to do the work in dispute. The carrier also sought an adjudication that the award and order were void.

In a two to one decision, the majority held that declaratory relief did not lie and the method of review set forth in the act, namely an enforcement suit by the em-

ployees (45 U. S. C. A. 153, First (p))* was the exclusive method of review.

The carrier had claimed a denial of constitutional rights, because the administrative proceeding did not comply with due process requirements. In answering this contention, the majority said that this would be important if the board's decision was final in the legal sense. However, as the decisions were not final, but the findings and order merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo*, the argument that the administrative proceedings were wanting in due process was cured by the full and complete opportunity given to the carrier in an enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution.

*45 U. S. C. A. 153 First (p) provides as follows:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

The carrier further contended that the act balanced the scales of justice unevenly by permitting employees to sue and not giving carriers the same right. In answering this contention, Justice Rutledge clearly recognized that if the "finality" provision was applied literally to a case in which an award was unfavorable to an employee, it might be invalid. At pages 245 and 246, he said:

"If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might thereafter have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

The dissent, written by Justice Stephens, held that the enforcement suit provided by the Act was not exclusive. He said (p. 273) that if it were held to be exclusive, one of the consequences would be that

“ . . . Congress intended to give the Board in effect final power to determine contract obligations—since the disputes which it is to consider are of a legal nature ‘growing out of the interpretation or the application of agreements’ (Section 2) notwithstanding the fact that the Board is concededly an adjustment board rather than one to adjudicate legal rights and obligations, and notwithstanding that if the Board, rather than giving effect to the actual legal obligations of a contract, should disregard them, the award would in effect abolish actual obligations and substitute new ones, thus reducing collective bargaining agreements to virtual nullity. . . .”

Justice Stephens, on pages 274-276, pointed out that there was nothing in the legislative history of the 1934 act indicating an intent to make the act's procedure exclusive. The provisions with respect to statutory suit and “finality” were not in the 1926 Act, and there was nothing in the legislative history of the 1934 Act, in which act the statutory suit and “finality” came into being, indicating that the remedy under the act was to be exclusive. Justice Stephens said, on page 276:

“And yet if that section forbids access to the courts in other forms of action, the 1934 Act represents a serious change over the 1926 Act. It would seem likely that, if it had been the intention of Congress to accomplish such a change, they would have said so.”

On page 269, Justice Stephens said, with respect to Congressional intention on the "finality" provision, that:

"It would seem more logical to conclude that it could hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board . . ."

Justice Stephens, in his opinion (p. 276), pointed out that if resort to the Courts by the carrier was precluded, under the Act, it would result in contract rights being taken without due process of law. The same result would obviously apply in the case of an employee barred from the courts:

"It is a settled rule of statutory construction that courts will if possible avoid such an interpretation of a statute as will raise serious doubts as to its constitutionality. I think the construction which the appellees put upon the Railway Labor Act would threaten its validity. For the position of the appellees can hardly be limited to declaratory relief. The argument is that Congress has made the adjustment procedure and statutory enforcement proceeding, in the event of an award, exclusive. The consequence must then be that there is no access to the courts whatever either for damages or by way of injunction or for declaratory relief. The last is but remedial. Declaratory judgment statutes add nothing to the substantive jurisdiction of the Federal courts. *Aetna Life Ins. Co. v. Haworth* and *Aetna Casualty & Surety Co. v. Quarles*, both cited *supra*. There is of course no constitutional right to a declaratory judgment as such, but if the Labor Act is construed to bar all judicial relief to the carrier party to a collective bargaining agreement this would deny the carrier

due process of law, since deprivation of remedy in the courts would destroy the character of collective bargaining agreements as contracts for the carrier. For the reasons stated in topic IV (1), the remedy afforded the carrier by way of defense to the enforcement proceeding available to employees only under Section 3(p) is in effect no protection. 'Without the remedy'—mainly an adequate remedy—"the contract may, indeed, in the sense of the law, be said not to exist, and its obligation not to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are 'inseparable' *Von Hoffman v. Quincy*, 1866, 4 Wall. 535, 552, 18 L. Ed. 403. Therefore a contract will have been taken without due process of law."

The Appellant has dwelt on the *Washington Terminal* case at length, because both majority and minority opinions are obviously well reasoned, their *dicta* persuasive and represent considerable effort on the part of their authors. Of equal importance is the fact that the case was affirmed by the Supreme Court by a four to four vote, Justice Rutledge not voting, and therefore represents a holding by that Court on the "finality" issue. Thus, in effect, as many as four members of the Supreme Court, who voted for affirmance, may have agreed with Justice Rutledge that where the board denied relief to an employee, and such denial was held to preclude resort to the courts, it might be unconstitutional. The four members of the Supreme Court who did not vote to affirm, clearly must have agreed with Judge Stephens that Congress did not intend to exclude an employee from recourse to the courts even though he lost before the board.

In *Dahlberg v. Pittsburg & L. E. R.* (1943), 138 F. 2d 121, the question of the finality of an award was presented to the Third Circuit. Employees there brought an action in the district court to enforce an order of the board which, by the board's interpretation of the contract between the carrier and the employees, gave seniority rights to the employees. The carrier urged that the construction of the contract by the board was clearly wrong and the court should refuse to enter an order of enforcement, while the employees contended that the board order was final and binding on the parties and the court was not authorized to review it. In affirming a dismissal of the employees' complaint, the court, at page 122, said:

"In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

And on page 123, the Court continued as follows:

“If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in *Washington Terminal Co. v. Boswell*, 75 U. S. App. D. C.; 124 F. 2d 235, 276, ‘There can be no valid delegation of governmental power to non-governmental agencies.’ *Carter v. Carter Coal Co.*, 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160. The Adjustment Board, consisting of bi-partisan group paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

“If it could be assumed that the Adjustment Board was a governmental agency still other doubts as to the Act’s constitutionality would be present, for example, the question whether there is such a lack of safeguards in the procedure before the Board as to amount to a denial of due process, there being no court review of the merits. This point was dealt with by Justice Rutledge in the *Washington Terminal Co. v. Boswell*, *supra*, as follows: ‘Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board’s decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality.’

“The reason for the choice of the words ‘final and binding’ will appear from the history of legislation providing for mediation of railway labor disputes. Under both the act of May 20, 1926, 45 U. S. C. A. §§151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the board had advisory powers only. See *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 makes the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable decisions.”

The appellant submits that Section 3 First (m) of the Railway Labor Act should not be construed to prevent an employee, whose claim has been denied by the board, from bringing a court action for damages for such wrongful discharge. As the Supreme Court said in *Moore v. Illinois Central R.R.*, *supra*, there is “nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge.”

II.

Assuming Arguendo That Section 3 First (m) of the Railway Labor Act Should Be Construed so as to Accord "Finality" to a Determination That an Employee Was Not Discharged in Violation of Provisions of a Collective Bargaining Agreement, the National Railroad Adjustment Board Has Made No Such Determination.

Attached to the submission of Appellant's union before the board, as "Employees Exhibit A" is the so-called transcript of the "investigation" of the charge against Appellant held by Appellee's assistant superintendent and trainmaster in Las Vegas on July 18, 1949 [R. 12-29]. It is obviously not a verbatim transcript, but apparently a re-write of what occurred by the chief clerk to the assistant superintendent. It does not even purport to be a verbatim transcript, but rather a series of questions and answers prepared for the signatures of the witnesses.

Article 33 of the collective bargaining agreement* pertinently provides that ". . . no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present" [R. 7]. The "investigation" and hearing was to be conducted in conformity with Article 33 [R. 13]. And despite this contractual requirement for a "thorough investigation," all witnesses were advised, according to the transcript, that they had been called as witnesses for the appellee [R. 16-17, 19, 24, 26], and the transcript recites that Mr. Groome, the Assistant Superintendent, said:

"As Brakeman Price, with his representative, did not appear at this investigation as directed there is

*Designated by Appellee for printing [R. 99], but apparently not deemed necessary to be printed because of its length.

no one present to present evidence or witnesses on his behalf. The investigation is closed. . . .”

Is an investigation “thorough” if the person conducting it elicits evidence only to sustain charges preferred by his employer against an employee? *Cf.*, *Hicks v. Hiatt*, 64 Fed. Supp. 238, 243, in which Judge Biggs held that an investigation was not “thorough” where the investigating officer paid little attention to evidence available to him.

The notice of investigation to Appellant stated: “You may produce such witnesses as you may desire, at your expense” [R. 13], although Article 25 of the collective bargaining agreement provided that trainmen “attending court or other business of the company” would be paid. Apparently it was felt that Appellant’s witnesses would not be testifying in behalf of the Appellee and their presence would not be necessary in order to have a “thorough” investigation.

Is an investigation “thorough” if the only witnesses who testify in support of the charges being investigated are to be paid for their attendance? Is it any wonder that Appellant’s brotherhood, in seeking his reinstatement, compared the hearing to a “Kangaroo Court?” [R. 31.] Manifestly then, the investigation held was not a “thorough” one.

However, let us proceed to examine the transcript to see what was being purportedly investigated. *The heart of the matter was whether or not Appellant did wrong in returning from Nipton to Las Vegas, to eat.* With the exception of statements by S. M. Smith, the assistant clerk, who made the transcript, with respect to his conversations with Appellant concerning his requests for post-

ponement [R. 16-17, 23-24], the statements of all other witnesses [Rose, R. 17-19; Dixon, R. 19-21, 23; Wilde, R. 26, and Grundy, R. 26-28], dealt solely with Appellant's return from Nipton to Las Vegas for the purpose of eating.

Dixon stated that Appellant was called to deadhead on a 9:15 P. M. train to Nipton for swing service (extra brakeman) [R. 20]. Rose, the train dispatcher in Las Vegas, stated that the train arrived at Nipton at 10:25 P. M. and that Appellant called him after arriving in Nipton, and the witness told him to protect a train which would arrive at Nipton about 4:00 A.M. He further stated that Appellant "said there was no place to eat or sleep at Nipton, and that he was returning on the first eastbound train" [R. 17-18].

Wilde, another Las Vegas train dispatcher, who apparently relieved Rose, stated that shortly after midnight, Appellant called him on the telephone and said: "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and Wilde told him definitely not. Wilde further stated that Appellant was not "arbitrary" with him [R. 24-25].

The submission by Appellant's brotherhood raised two issues. They were (1) that the Appellee ignored Article 33 of the collective bargaining agreement by holding the hearing when it knew Appellant's representative was not available and requiring him to pay his own witnesses, and (2) that Appellant was justified in leaving Nipton for food because Article 32(b) of the collective agreement provided as follows:

"Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available." [R. 7-9.]

The Appellee thereafter submitted to the board its response to the submission filed in behalf of Appellant [R. 71]. That response was not part of the record in the Court below. A rebuttal to the response was thereafter filed by the brotherhood [R. 42-56]. The Appellee's response was obviously of some length as the rebuttal refers to matters contained on page 21 of the response [R. 42]. It is a reasonable inference from a reading of the rebuttal that the response dealt primarily with the contention of the brotherhood that under the collective agreement the Appellee had no right to tie up Appellant at Nipton where there were no eating and sleeping facilities, for almost all of the rebuttal deals with this issue and answers points raised in the response with respect thereto.

In this regard, it is noteworthy that the Appellee in its response stated "There were, of course, adequate eating and sleeping accommodations at Nipton . . ." [R. 45] and the rebuttal submitted a notarized notice dated July 2, 1949, addressed to Appellant's brotherhood advising there would be no meals served at the Nipton Hotel between 8:00 P. M. and 6:00 A. M. daily until an agreement was reached providing a certain minimum revenue from rooms [R. 45-46].

Whether or not Appellee violated the collective agreement by detaining swing brakemen at Nipton where there were no eating and sleeping facilities was not only the crux of the controversy between Appellant and Appellee, but this apparently was a matter of controversy between the brotherhood and Appellee, and as a result the brotherhood had taken the matter to the National Mediation Board [R. 55], and on July 15, 1949,

a mediation agreement was entered into by the terms of which swing brakemen would not be detrained at Nipton [R. 38-41, 43, 45].

As pointed out above, the heart of the matter to be investigated by the assistant superintendent and trainmaster was whether or not Appellant did wrong in returning from Nipton to Las Vegas to eat. A determination of this question would undoubtedly be a determination on the merits. This very question was raised in the brotherhood's submission, responded to by the Appellee at apparent length, and such response vigorously rebutted by the brotherhood's rebuttal.

Let us examine to see what the board did with respect to this vital issue, the issue that was on the merits. The board, in its findings, said as follows:

"If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

"The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of the agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

"Basically, the complaint is that the hearing was held when the claimant was not present." [R. 57.]

Although the remainder of the board's findings are completely illogical and unpersuasive, ignoring completely the contentions that the investigation was not "thorough," that Appellant's representative was not available as required by the collective agreement, and Appellant should

not, under the agreement, have been required to pay for the attendance of his witnesses, the above-quoted findings with respect to the merits are truly fantastic.

In *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, 243, 94 L. Ed. 795, the Supreme Court spoke of the board and its functions as follows:

“ . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the boards initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nations railway system.”

The expertise attributed by the Supreme Court to the board in the *Slocum* decision was patently absent in its award and findings in Appellant's case. None of the provisions of the collective bargaining agreement upon which Appellant's brotherhood relied was even referred to by indirection. The merits of the controversy were not even considered.

Assuming Section 3 First (m) of the Act is entitled to the construction Appellee's will undoubtedly claim, can an award of this nature be deemed “final and binding” and result in the loss of valuable contract rights? Should such an award be held to deprive Appellant of his day in Court on the issue of whether or not, in the light of

Article 32 of the collective agreement, he was justified in returning from Nipton to Las Vegas to eat? Should such an award be held to deprive him of a determination of such a vital contract issue? Even courts which hold that an award unfavorable to an employee is final concede that the employee is entitled to a determination on the merits.

Koelker v. Baltimore and Ohio Railroad Company (1956), 140 Fed. Supp. 887, 889 (D. C. E. D., Pa.), was an action against a carrier for salary lost by an employee as a result of being laid off allegedly without good cause. Employee had submitted her case to the board, which denied the claim. The court said that if the award of the board was on the merits, its decision was final. The carrier had raised two defenses before the board. The first was that the employee was not represented by her brotherhood and therefore the board had no jurisdiction. The second was that the railroad's actions were justified in that there was evidence that plaintiff was emotionally unstable and she manifested an abnormal personality which would result in continuing conflict with fellow employees. The Court said the second defense before the board was on the merits. The award of the board pertinently provided as follows:

“‘Opinion of Board: The evidence of record reveals that there is no dispute between the parties to the controlling Agreement.

“‘Findings: The Third Division of the Adjustment Board, upon the whole record, and all the evidence, finds and holds:

“‘That both parties to this dispute waived oral hearing thereon;

“‘That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees

within the meaning of the Railway Labor Act, as approved June 21, 1934;

“ ‘That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

“ ‘That Carrier’s action in this case will not be disturbed.

“ ‘Award

“ ‘Claim denied in accordance with Opinion and Findings.’ ”

The Court said that it found it impossible to tell from the record whether or not the award was a decision on the merits, and as the board had exclusive primary jurisdiction because it involved a grievance under a labor agreement (*Slocum v. Delaware, L. & W. R. Co., supra*), he deferred a ruling on the carrier’s motions to dismiss and for summary judgment for a sufficient time to permit plaintiff to obtain an award on the merits.

The *Koelker* case was not a wrongful discharge case as is the instant case, and under the *Moore v. Illinois, supra*, decision, Appellant could treat the Appellee’s action discharging him as final, and sue in court for breach of contract. In *Slocum*, the Supreme Court, page 244, said:

“Our holding here is not inconsistent with our holding in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad’s action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs

from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

In *Michel v. Louisville & N. R. Co.* (C. A. 5, 1951), 188 F. 2d 224, 225, 227, one of the cases cited below by Appellee, the plaintiff brought an action for wrongful discharge against a carrier, claiming the discharge constituted a violation of the collective agreement. The Court, on pages 224 and 225, said:

"The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

As the board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

"It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

In *Kelly v. N. C. & St. Louis Ry.* (E. D. Tenn., 1948), 75 Fed. Supp. 737, a discharged locomotive engineer sued for wrongful discharge. The defendant railroad moved for summary judgment on the ground that the plaintiff had voluntarily carried his claim before the Railroad Adjustment Board to final hearing and the board had the matter under advisement. In granting the motion for summary judgment, the Court stated:

“This adjudication is made with the understanding that the plaintiff has a petition and record before the Adjustment Board to which the defendant has appeared and made defense, all to the end that the Adjustment Board has taken jurisdiction to and will, determine the grievance upon its merits. The plaintiff must have a hearing on the merits, either before the Board or in this court . . .”

Thus, even assuming finality should be attributed to a board award determining the merits of a discharge claimed to be in violation of a collective bargaining agreement, and Appellant urges that such an award cannot legally be so dignified, Appellant has had no such determination and was entitled to seek relief in the court below. *Cf., Union Pacific R. Co. v. Olive* (C. A., 9, 1946), 156 F. 2d 737.

Conclusion.

For the reasons stated herein, the Appellant respectfully prays that the order granting summary judgment be reversed.

Respectfully submitted,

SAMUEL S. LIONEL,

Attorney for Appellant.

No. 15649

United States
Court of Appeals
for the Ninth Circuit

L. L. PRICE,

Appellant,

VS.

UNION PACIFIC RAILROAD,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

SEP 13 1957

PAUL F. GIBSON, CLERK



No. 15649

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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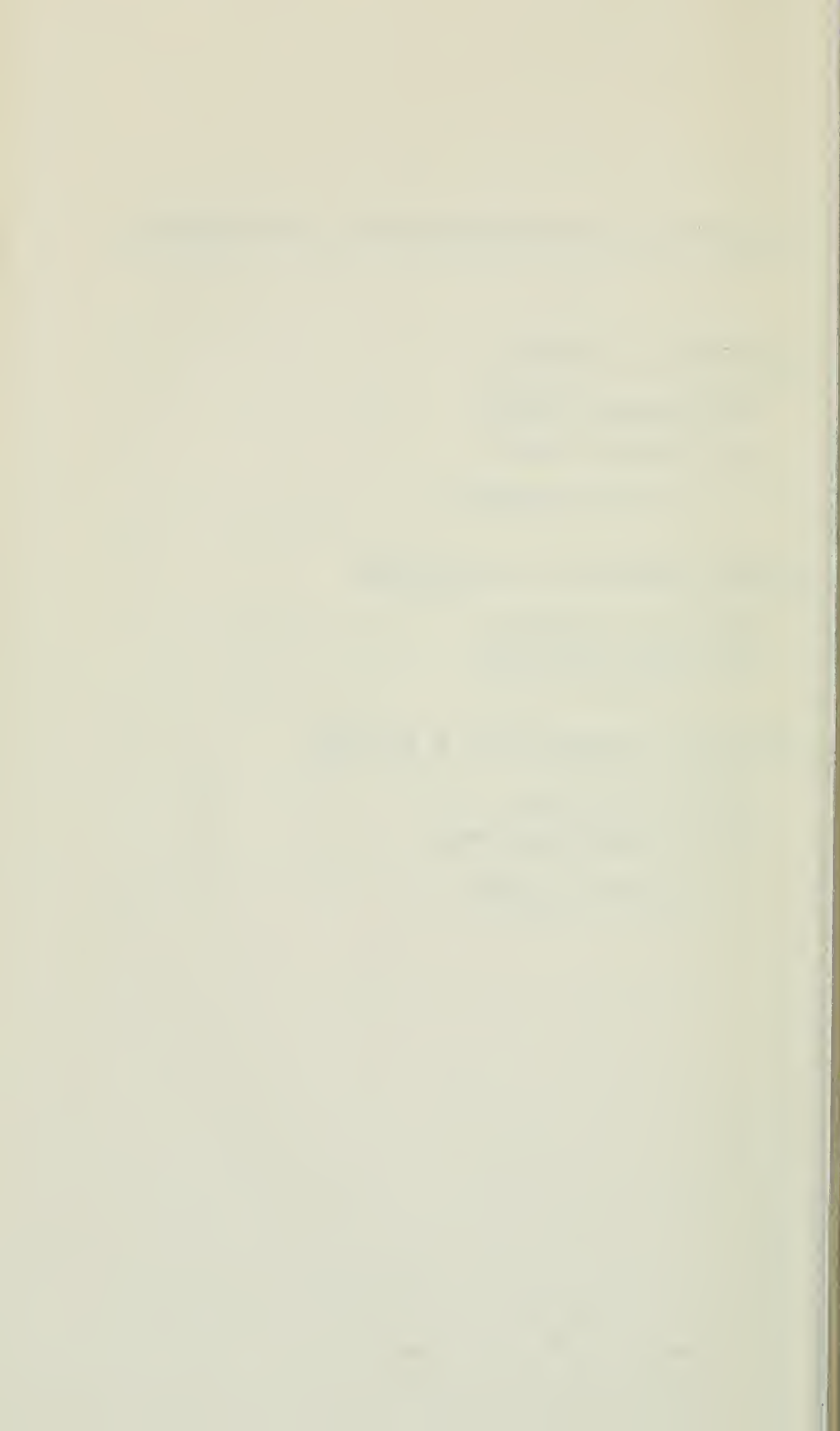


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In the District Court of the United States
for the District of Nevada

No. 117

L. L. PRICE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD, Defendant.

COMPLAINT

I.

Plaintiff is a citizen of the State of Nevada and defendant is a corporation incorporated under the laws of the State of Utah. The matter in controversy, exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

Plaintiff was employed by defendant as a trainman from on or about September 11, 1942, until he was notified by defendant on or about July 24, 1949, that he was dismissed.

III.

For many years prior to and until the said dismissal, plaintiff was a member of the Brotherhood of Railway Trainmen.

IV.

From April 1, 1943, up to and including July 24, 1949, there was in effect a written collective bargaining agreement and other written agreements between the said Brotherhood of Railway Trainmen

and defendant. Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

V.

The dismissal of plaintiff by defendant was wrongful and in violation of the said agreements in the following respects:

(a) There was no thorough investigation made of alleged faults on the part of plaintiff.

(b) Plaintiff was not afforded an opportunity to have a trainman of his choice present at the investigation held.

(c) Plaintiff was not afforded a reasonable opportunity to prepare his defense.

(d) Plaintiff was not afforded a reasonable opportunity to present his defense at the said investigation.

(e) Plaintiff was not present at the said investigation.

(f) Plaintiff was not afforded an opportunity to have witnesses present in his behalf at the said investigation.

(g) Plaintiff was denied the right to have witnesses present in his behalf at the said investigation at the expense of defendant.

(h) Plaintiff was not afforded a reasonable opportunity to participate in his own defense at the said investigation.

(i) Plaintiff was dismissed without cause.

VI.

As a direct and proximate result of said wrong-

ful dismissal, plaintiff has at the time of the filing of this complaint lost earnings in the amount of \$18,517.00.

VII.

As a direct and proximate result of said wrongful dismissal, plaintiff will lose future earnings and valuable seniority, retirement, hospitalization, and transportation rights.

Wherefore, plaintiff demands judgment against defendant in the sum of One Hundred and Eighteen Thousand Five Hundred and Seventeen (\$118,517.00) Dollars, and costs.

RALLI, RUDIAK & HORSEY,

/s/ By SAMUEL S. LIONEL,

Attorneys for Plaintiff.

[Endorsed]: Filed June 6, 1955.

National Railroad Adjustment Board
First Division

Docket No. 27393

Parties to Dispute: Brotherhood of Railroad Trainmen, Union Pacific Railroad Company (South Central District).

EMPLOYEES' SUBMISSION EX PARTE

Statement of Claim

Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Statement of Facts

On July 12, 1949, Brakeman L. L. Price, regularly assigned to the brakemen's extra board at Las Vegas, Nevada, which protects extra service in both directions from Las Vegas, Nevada, was called to deadhead on train No. 37, a passenger train, from Las Vegas, Nevada, to Nipton, California, a station en route 56.7 miles west of Las Vegas, for swing service. Train No. 37 arrived at Nipton, California, at 10:30 P.M. on July 12. Brakeman Price immediately contacted the train dispatcher at Nipton, and was advised that his services as swing brakeman (a third brakeman who is not a regularly assigned member of the crew) from Nipton, California, would be utilized on extra 1622 east which was due to arrive at Nipton at about 4:30 A.M.. Brakeman Price informed the train dispatcher that he was returning to Las Vegas, Nevada, for the purpose of securing food, there being no eating facilities at Nipton or at any point en route between Nipton and Las Vegas. Brakeman Price returned to Las Vegas on extra 1623 east at 12:35 A.M. on July 13.

After obtaining food, Brakeman Price called the train dispatcher and advised him that he (Brakeman Price) was ready to return to Nipton on a freight train due to depart from Las Vegas at 1:45 A.M. The train dispatcher instructed Brakeman Price at that time that he need not return to Nipton. Upon receipt of such instructions, Brakeman Price properly registered in on the brakemen's register book at Las Vegas and returned to his

home. Brakeman Price was held from service effective at 9:05 A.M. on July 13, and at 7:00 P.M. on July 16 he received a notice to appear for an investigation at 10:00 A.M. on July 17, as indicated in Employees' Exhibit B.

On July 17 Brakeman Price consented to postponement of the investigation until 9:30 A.M. on July 18, as indicated in Employees' Exhibit C. On July 18 Brakeman Price appeared for the investigation and requested postponement until his representative (B.R.T. Local Chairman) could be present to represent him, as indicated in Employees' Exhibit D. On July 24, 1949, Brakeman Price was discharged from the services of the carrier.

Position of Employees

That Brakeman L. L. Price was dismissed from service unjustly and without recourse in violation of the agreement under which he was working at the time of his dismissal is supported by the provisions of Section (a) of Article 33 of the agreement effective April 1, 1943, governing wages and working conditions of conductors, brakemen, and train baggagemen, reading as follows:

"When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present. Ordinarily such an investigation will be held within seven (7) days from date of suspension; if found innocent he will be reinstated and paid for time lost. All witnesses shall, after giving

their testimony at an investigation, remain present during the continuance of such investigation. Copy of his statement will be furnished, which employee must sign. Transcript of testimony of all witnesses will be furnished to the General Chairman upon request when discipline is administered."

That portion of the above rule reading:

"* * * no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present."
(Underscore ours)

was grossly ignored by the carrier in dismissing Brakeman Price.

The employees contend that that portion of the Notice of Hearing, identified herein as Employees' Exhibit B, reading as follows:

"You may produce such witnesses as you may desire, at your expense."

is contrary to the above referred to Section (a) of Article 33 and is in no way a part of the agreement between the employees and the carrier and that this portion of the Notice of Hearing was, within itself, the principal contributor to the request for the first postponement, identified herein as Employees' Exhibit C. Witnesses whose testimony was considered pertinent in developing the facts relative to the carrier's charges against Brakeman Price were not available at Las Vegas on July 17. As indicated on

page 3 of Employees' Exhibit A in the following question and answer:

"Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative?

"A. Yes, sir."

representatives of the carrier were obviously aware that the Local Chairman was not available in Las Vegas and that it was Brakeman Price's desire to have the Local Chairman represent him. The arbitrary action of the carrier's representatives is indicative of their deliberate attempts to deprive Brakeman Price of an investigation in accordance with the agreement under which he was employed.

The employees further contend that Brakeman Price did not violate any rules in leaving Nipton to secure food. That Brakeman Price was justified in these actions is supported by the provisions of Section (b) of Article 32 of the agreement effective April 1, 1943, reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

It is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question, and it is apparent that his services were not needed at a time which would necessitate his being deadheaded from Las Vegas on train No. 37. It will be noted that his services were never utilized from Nipton to Las Vegas and neither was any other brakeman sent

from Las Vegas to protect the services originally intended for Brakeman Price.

It is further interesting to note that at the time of this incident (July 12, 1949) representatives of the carrier had arbitrarily, without negotiation, set up a condition wherein swing brakemen (a third brakeman who is not a regularly assigned member of the crew) would detrain at Nipton, California, a station en route, without satisfactory eating and sleeping facilities and without any eating facilities during the hours from 8:00 P.M. to 6:00 A.M. Such arbitrary action of the carrier's representatives, in their efforts to nullify the provisions of Section (b) of Article 32 governing tie-ups and releases of swing brakemen, resulted in a dispute which prompted the employees' representatives to request that the National Mediation Board take jurisdiction. At the time of the occurrence resulting in this controversy, negotiations were being conducted in Salt Lake City, Utah, with the assistance of a member of the National Mediation Board and the Assistant to the President of the Brotherhood of Railroad Trainmen, in National Mediation Board Case No. 3172. Such negotiations resulted in the consummation of the agreement attached hereto and identified as Employees' Exhibit K.

In further support of the employees' contentions enumerated herein is a copy of the transcript of the so-called investigation conducted by officers of the carrier, the employees not participating, identified as Employees' Exhibit A; the carrier's Notice of Hearing dated July 16, 1949, identified as Em-

ployees' Exhibit B; postponement of investigation scheduled for July 17, identified as Employees' Exhibit C; request for postponement of investigation on July 18, identified as Employees' Exhibit D; General Chairman's submission to the General Manager under date of March 27, 1950, identified as Employees' Exhibit E; General Manager's reply to General Chairman under date of March 30, 1950, identified as Employees' Exhibit F; General Chairman's reply to the General Manager on April 5, 1950, identified as Employees' Exhibit G; the General Manager's position, subsequent to conference, dated May 22, 1950, identified as Employees' Exhibit H; General Chairman's letter of May 31, 1950, to General Manager requesting joint submission to the First Division of the National Railroad Adjustment Board, identified as Employees' Exhibit I; General Manager's reply of July 5, 1950, identified as Employees' Exhibit J; Mediation Agreement No. 3172 dated July 15, 1949, identified as Employees' Exhibit K.

The entire text of the charges against Brakeman Price and his subsequent removal from service are indicative of unjust discrimination against one employee, and we earnestly request that your Honorable Board so declare by rendering an affirmative award in this case.

It is affirmed that all data submitted herein in support of our position has heretofore been presented to the representative of the carrier, and is hereby made a part of the question in dispute.

Oral hearing is waived unless requested by representatives of the carrier.

Brotherhood of Railroad Trainmen,
Union Pacific Railroad Company,
(South Central District),

By1

L. E. Foley,
General Chairman.

EMPLOYEES' EXHIBIT A

Investigation and hearing conducted in office of Assistant Superintendent, Las Vegas, Nevada, with Brakeman L. L. Price, in connection with his failure to protect his assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and dead-heading from Nipton to Las Vegas without proper authority, constituting violation of Operating Rules 700 and 702; investigation convened at 10:00 A.M., July 17th, 1949, but postponed at request of Brakeman Price until 9:30 A.M., July 18th, 1949; further postponed until 2:30 P.M., July 18th, 1949, to permit Brakeman Price to secure representation.

Present: W. B. Groome, Asst. Supt.; N. D. Nelson, Trainmaster.

Witnesses: L. L. Price, Brakeman; R. L. Gundy, Asst. Chief Dispr.; G. J. Wilde, Asst. Chief Dispr.; L. L. Rose, CTC Dispatcher; A. L. Dixon, Chief Crew Dispr.; S. M. Smith, Chief Clerk to Asst. Supt.

Reported by: S. M. Smith, Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Price:

Q. Mr. Price, your notice of investigation and hearing, dated Las Vegas, July 16th, 1949, reads as follows:

“Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting yourself from duty without proper authority.

“The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

“You will be withheld from service pending the outcome of this investigation and hearing.

“You may produce such witnesses as you may desire, at your expense.

“Signed: W. B. Groome, Asst. Supt.”

Mr. Price, was this notice of investigation and hearing received by you within the time provided in your schedule?

A. Yes, sir.

Exhibit A—(Continued)

Q. Do you desire representation?

A. I do.

Q. Is your representative present?

A. No, sir.

Q. Is it your desire to request postponement of this investigation until you produce your representative? A. It is.

Q. The investigation is postponed until 9:30 A.M., July 18th, 1949, and it will be necessary for you to sign Form "C" requesting postponement of the investigation until that time.

I have read the above and it is correct:

/s/ L. L. Price,
Brakeman.

Transcript correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

(Investigation recessed at 10:15 A.M., July 17th, 1949.)

(Investigation reconvened at 2:30 P.M., July 18th, 1949, with Brakeman L. L. Price in absentia.)

Mr. Groome:

On July 16th, 1949, the following notice of hearing was issued to L. L. Price, Brakeman, Las Vegas, Nevada, reading as follows:

"Please report at the office of the Assistant Superintendent, in the depot building, Las Vegas, Nev., on July 17th, 1949, at 10:00 A.M., for investigation and hearing on charges that you refused to protect your assignment as Swing Brakeman at

Exhibit A—(Continued)

Nipton, Calif., on July 12th, 1949, and deadheaded from Nipton to Las Vegas, Nev., without authority, constituting violation of Operating Rule 700, specifically, insubordination, and Operating Rule 702, specifically, failure to comply with instructions from proper authority and absenting yourself from duty without proper authority.

“The investigation and hearing will be conducted in conformity with the provisions of Article 33 of the agreement effective April 1st, 1943, between the Company and the ORC-BofRT, and you are entitled to representation as provided in that Article.

“You will be withheld from service pending the outcome of this investigation and hearing.

“You may produce such witnesses as you may desire, at your expense.

“Signed: W. B. Groome, Asst. Supt.”

On July 17th, 1949, the following consent to postponement, addressed to W. B. Groome, Asst. Superintendent, Las Vegas, Nev., was signed by Brake-man L. L. Price, reading as follows:

“Please refer to the notice of investigation and hearing which you sent to me under date of July 16th, 1949.

“I hereby consent to the postponement of this investigation and hearing until July 18th, 1949, commencing at 9:30 A.M., and agree that such postponement shall not affect the validity of such hearing in any way.

“Signed: L. L. Price, Brakeman.”

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, you have been called as a carrier witness in this investigation. Will you state your name and occupation?

A. S. M. Smith, Chief Clerk to Asst. Superintendent, Las Vegas.

Q. Did Brakeman L. L. Price request a further postponement of the investigation, which had been postponed at his request until 9:30 A.M. today?

A. Yes, sir.

Q. What was his reason for asking for a further postponement?

A. He claimed that Mr. E. C. Grounds, his representative, was in Milford, Utah, and he did not desire to have the investigation until Grounds' return.

Q. Was he advised that the investigation would be deferred until 2:30 P.M. today for him to get some other representative?

A. Yes, sir.

Q. Did Brakeman Price show up at 2:30 P.M.?

A. No, sir.

Q. Did he hand you the following letter, addressed to Mr. W. B. Groome, dated Las Vegas, July 18th, 1949, reading as follows:

“Referring to notice of investigation originally set for 10:00 A.M., July 17th, and postponed at my request until 9:30 A.M., July 18th:

“I hereby request further postponement until my representative, Mr. E. C. Grounds, is in Las Vegas.

“Signed: L. L. Price.”

Exhibit A—(Continued)

A. Yes, sir. He asked me to write that letter for him.

I have read the above and it is correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Mr. Groome:

In view of the fact that Brakeman Price has not appeared at 2:30 P.M., as directed by me, the investigation and hearing will proceed with Brakeman Price in absentia.

Questions by Mr. Groome:

Statements by Mr. Rose:

Q. Mr. Rose, you have been called as a witness for the carrier in this particular case. Please state your name and occupation.

A. L. L. Rose, Train Dispatcher, Las Vegas.

Q. Were you working as the CTC Train Dispatcher between Las Vegas and Yermo on July 12th, 1949?

A. Yes, sir.

Q. Do you recall the case of Brakeman L. L. Price being deadheaded on train No. 37 for swing brakeman service to Nipton, Calif., on that date?

A. Yes, sir.

Q. Are brakemen required by Superintendent's Circular instructions to contact the train dispatcher after arriving at Nipton?

A. Yes, sir.

Q. Did Brakeman Price contact you after arriving at Nipton on No. 37 July 12th?

A. Yes, sir.

Q. What instructions did you give him?

Exhibit A—(Continued)

A. I instructed Brakeman Price to protect X 1622 E, which would arrive Nipton about 4:00 A.M., but told him to call in at 3:20 A.M. so that if the DLS train arrived Nipton in time for X 1622 E the dispatcher on duty might deadhead him back to Las Vegas on No. 38.

Q. Did Brakeman Price comply with your instructions? A. No.

Q. What did he do?

A. Brakeman Price deadheaded to Las Vegas on X1623E.

Q. Do you recall what time X1623E was by Nipton? A. No, I don't.

Q. The report submitted by Asst. Chief Dispatcher Gundy is to the effect that No. 37, on which Swing Brakeman Price deadheaded to Nipton, arrived there at 10:25 P.M., and the MSF train, X1623E, arrived Nipton at 11:10 P.M. Is that approximately correct? A. That is about right.

Q. Did Brakeman Price take exception to the instructions you gave him? A. Yes.

Q. Briefly, what was the phone conversation you had with him, as you recall it?

A. Brakeman Price said there was no place to eat or sleep at Nipton, and that he was returning to Las Vegas on the first eastbound train.

Q. Did you have any further conversation with him? A. No.

Q. Did Asst. Chief Dispatcher, Mr. Gundy, then talk with him? A. Yes.

Exhibit A—(Continued)

Q. To your knowledge, did Brakeman Price return to Las Vegas on the MSF train? X 1623 E?

A. I have no way of knowing that.

Q. Did Brakeman Price make it plain to you he was returning to Las Vegas on the next east-bound train?

A. Yes, sir.

Q. And you had previously advised him there was a possibility he would be deadheaded from Nip-ton to Las Vegas on No. 38?

A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ L. L. Rose,

Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, you have been called as a carrier witness in this particular case. Please state your name and occupation.

A. A. L. Dixon, Chief Crew Dispatcher, Las Vegas.

Q. Is the handling of train crews at Las Vegas, including swing brakemen, your responsibility?

A. Yes, sir.

Q. Do you have certain records which would give the movements of swing brakeman Price out of Las Vegas July 12th, 1949?

A. Yes, sir.

Q. What do your records disclose as to Brake-man Price moving out of Las Vegas on that date?

Exhibit A—(Continued)

A. He was called to deadhead on Train 37, 9:15 P.M., July 12th, 1949, to Nipton, Calif., for swing service.

Q. Deadheading on No. 37, what would be his time on duty? A. 9:15 P.M.

Q. And do you have any other records in your office which would give the arrival time of Brakeman Price from Nipton? A. Yes, sir.

Q. What record do you have to indicate his arrival time?

A. We have the Extra Brakemen's Register of Arrival, which every extra brakeman is required to register on when they arrive Las Vegas.

Q. What is the purpose of having the extra brakemen register on this particular form.

A. So that they will be marked up on the board in the proper order, in accordance with their agreement.

Q. Is that the responsibility of the carrier, to see that brakemen are marked up in their proper order? A. Yes, sir.

Q. Is this sheet prepared on a daily basis?

A. Yes, sir.

Q. I hand you herewith a mimeographed form, "Extra Brakemen's Register of Arrival," for July 13th, 1949. Is Brakeman L. L. Price registered on that form? A. Yes, sir.

Q. What time is he shown as arriving Las Vegas? A. 12:35 A.M., deadhead, on X 1623 E.

Exhibit A—(Continued)

Questions by Mr. Groome:

Q. And the fact that Brakeman Price registered as arriving on X 1623 E, at 12:35 A.M., would that mean to you he had arrived on that particular train? A. Yes, sir.

Q. Is there any other item on your mimeographed form of the extra brakemen's register of arrival, July 13th, concerning Brakeman L. L. Price? A. No, sir.

Q. Is it apparent to you that the only train he arrived at Las Vegas on on July 13th, 1949, was X 1623 E, at 12:35 A.M.? A. Yes, sir.

Q. Are you familiar with Form 2639, commonly known as conductor's train book? A. Yes, sir.

Q. I hand you herewith train book of Conductor W. E. Montgomery, covering his trip from Yermo to Las Vegas on July 13th, 1949, with X 1622 E, departing from Yermo at 1:40 A.M. and arriving Las Vegas 9:05 A.M., July 13th. Will you state for the record, and from Conductor Montgomery's train book, the brakemen he had into Las Vegas?

A. Brakemen E. E. Spainhower, H. C. Jackson and G. E. White.

Q. Is there any record of Brakeman L. L. Price on that particular train? A. No, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. Dixon,

Chief Crew Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Robertson, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 A.M., July 13th, 1949? A. Yes, sir.

Q. Who was the Swing Brakeman shown by Conductor Robertson?

A. Brakeman G. E. White.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?

A. Yes, sir. That was also Brakeman G. E. White.

Q. Did the Timekeeper secure this information from Form 5031, the time slips submitted by these two conductors?

A. Yes, sir. He told me to wait until he got their time slips.

Q. Did either time slip show any other brakeman in swing service between Las Vegas and Nipton, other than Brakeman G. E. White?

A. No, sir. Not according to the information given me.

Exhibit A—(Continued)

I Have Read The Above and It Is Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Groome:

Statements by Mr. Dixon:

Q. Mr. Dixon, do you have any record to show the last arrival and departure time of Mr. E. C. Grounds, who was desired by Brakeman Price as his representative? A. Yes, sir.

Q. Would you state when he arrived at Las Vegas on July 16th, 1949?

A. At 7:50 P.M., July 16th.

Q. And departed when?

A. 8:00 P.M., July 17th.

Q. Was Mr. Grounds rested at 10:00 A.M., July 17th? A. Yes, sir.

I Have Read The Above and It Is Correct:

/s/ A. L. DIXON,

Chief Crew Dispatcher.

Questions by Mr. Groome:

Statements by Mr. Smith:

Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 A.M., July 17th, for the investigation, as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

Exhibit A—(Continued)

Questions by Mr. Groome:

Statements by Mr. Smith:

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 A.M., July 17th, and he didn't want to have to pay him for laying off to attend the investigation as his witness.

I have Read The Above and It Is Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Wilde:

Q. Mr. Wilde, you have been called as a carrier witness in connection with this case. Please state your name and occupation.

A. George J. Wilde, Train Dispatcher.

Q. Were you Asst. Chief Dispatcher, on duty Las Vegas 11:30 P.M., July 12th, to 7:30 A.M., July 13th, 1949?

A. Yes, sir.

Q. And during your tour of duty on those dates did you have conversation with Brakeman L. L. Price?

A. I did.

Q. About what time was this, Mr. Wilde?

A. Shortly after midnight, July 13th.

Q. What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you

Exhibit A—(Continued)

want me to go back out on this MLA to protect the UX connection at Nipton.

Q. Was this on the phone, or personal contact?

A. On the telephone.

Q. Do you know where he was calling from?

A. Not definitely.

Q. You assumed him to be calling from the yard office?

A. From the Crew Dispatcher's office.

Q. Did he inform you he had arrived Las Vegas from Nipton, or did he tell you how he had arrived here?

A. He didn't tell me how.

Q. Did he give you any particulars at all?

A. No, sir. He said he came into Las Vegas to eat.

Q. Had you been informed by the afternoon Asst. Chief Dispatcher, whom you relieved at 11:30 P.M., of the performance of Brakeman L. L. Price at Nipton?

A. Yes, sir.

Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 P.M. and arriving Las Vegas shortly after midnight?

A. Yes, sir.

Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary.

Q. You made it very plain to him?

A. Yes, sir.

Q. Was he arbitrary with you on the phone?

A. No, sir.

Exhibit A—(Continued)

Q. Did he tell you on the phone why he left Nipton?

A. No, sir. Other than that he came to Las Vegas to eat.

I Have Read The Above and It Is Correct:

/s/ G. J. Wilde,
Train Dispatcher.

Transcript Correct:

/s/ S. M. Smith,
Chief Clerk to Asst. Supt.

Questions by Mr. Nelson:

Statements by Mr. Gundy:

Q. Mr. Gundy, you have been called as a carrier witness in this investigation. Please state your name and occupation.

A. Richard L. Gundy, Asst. Chief Dispatcher.

Q. Were you Asst. Chief Dispatcher at Las Vegas July 12th, 1949, from 3:30 P.M. to 11:30 P.M.?

A. Yes, sir.

Q. During those hours did you instruct that a swing brakeman be deadheaded on train No. 37 to Nipton, Calif., for swing service?

A. I did.

Q. And was Brakeman L. L. Price called for this assignment?

A. Yes, sir.

Q. Did he make the trip Las Vegas to Nipton on train 37?

A. Yes, sir.

Q. Arriving there about 10:25 P.M.?

A. Yes, sir.

Q. On arrival at Nipton did he contact Train Dispatcher Rose?

A. Yes, sir.

Exhibit A—(Continued)

Q. Did you have a phone conversation with Brakeman Price from Nipton?

A. Yes. After Price came back from trying to find some place to eat and told the Dispatcher he was coming back from Nipton to Las Vegas.

Q. What were Train Dispatcher Rose's instructions to Brakeman Price at Nipton on his arrival there?

A. That he protect a train arriving Nipton about—I believe it was 4:00 A.M.

Q. He was not released? A. No.

Q. Did he give Train Dispatcher Rose some argument?

A. Yes. He told him someone had to call him. He wanted an hour and a half call.

Q. But he was instructed by Train Dispatcher Rose to remain there and protect the UX, to arrive there approximately 4:00 A.M.? A. Yes.

Q. Did you talk with Brakeman Price on the phone after Dispatcher Rose had talked with him?

A. I did. I told Price if I were him I would protect the train and handle any grievance through his organization, as it should be handled.

Q. How did Brakeman Price reply to you?

A. I think he said, "Thank you, but I am going back to Las Vegas on the first train account no place to eat here."

Q. Did you give him positive instructions to remain there and protect the UX?

A. I told him that was his assignment, to pro-

Exhibit A—(Continued)

tect the UX, and if I were him I would not come back to Las Vegas and leave it unprotected.

Q. And you did not relieve him to return from Nipton to Las Vegas on the MSF?

A. No, sir.

Q. Do you know whether he came in on the MSF or not?

A. No. I don't. I wouldn't say whether he did or whether he protected the UX, because after I went home I didn't pay any more attention to it.

Q. You had no further conversation with Brake-man Price?

A. No, sir. I went home shortly after that.

Q. Is there any other information you have, Mr. Gundy, that might have any bearing on this case?

A. No. I think not. That is about all the conversation I had with him.

Q. Brakeman Price, then, did not comply with your instructions at Nipton?

A. As far as I know, he did not.

I Have Read The Above and It Is Correct:

/s/ R. L. GUNDY,

Asst. Chief Dispatcher.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

Mr. Groome:

As Brakeman Price, with his representative, did not appear at this investigation as directed there

Exhibit A—(Continued)

is no one present to present evidence or witnesses on his behalf. The investigation is closed. The evidence will be transcribed and carefully considered and Brakeman Price will be advised of the result of the investigation in due course.

Transcript Correct:

/s/ S. M. Smith,

Chief Clerk to Asst. Supt.

[Note: Exhibit B "Notice of Hearing" is set out at pages 14-15. Exhibit C "Consent to Postponement" at page 15 and Exhibit D "Request For Further Postponement" at page 16.

EMPLOYEES' EXHIBIT E

March 27, 1950

File No. 7-P-37

Mr. F. C. Paulsen

General Manager

Union Pacific Railroad Company

10 South Main Street

Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

Decision of Superintendent D. F. Wengert, file No. PR-41949, being unsatisfactory, appeal is hereby taken.

Statement of Facts:

On July 16, 1949, Brakeman L. L. Price, regularly assigned to the brakemen's extra board at Las Vegas, Nevada, received notice to appear at the office of the assistant superintendent at Las Vegas, Nevada, at 10:00 A.M. on July 17, 1949, for an investigation on charges that he (Brakeman Price) refused to protect an assignment as swing brakeman at Nipton, California, on July 12, 1949, etc. On July 17, 1949, Brakeman Price consented to a postponement of the investigation until 9:30 A.M. on July 18. On July 18, 1949, Brakeman Price notified the assistant superintendent that the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was engaged in making a trip from Las Vegas, Nevada, to Milford, Utah, and return in the services of the Union Pacific Railroad Company, and Brakeman Price requested that the above referred to investigation be postponed until such time as the representative of his choice (B.R.T. Local Chairman E. C. Grounds) was available. On July 24, 1949, Brakeman Price was notified that he was discharged from the service of the Union Pacific Railroad Company. Brakeman Price was withheld from service from July 13, 1949. Brakeman Price was present at the office of the assistant superintendent at 10:00 A.M. on July 17 and at 9:30 A.M. on July 18, 1949.

Position of Committee

Paragraph (a) of Article 33 of the agreement ef-

fective April 1, 1943, under which Brakeman L. L. Price was employed, reads in part as follows:

“When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present.” (Underscores added.)

The intent and purpose of the removal from service of Brakeman Price without affording him a thorough investigation and an opportunity to have present a trainman of his choice is as yet not clear to this committee. However, the above facts reveal conclusively that Brakeman Price was removed from service without recourse, without a thorough investigation, without an opportunity to secure the representative of his choice, and without regard for the provisions of the agreement under which he is employed, and this is obviously not consistent with the normal procedure used on this property in securing facts which would sustain the alleged charges.

The removal of a trainman from service in this manner is indicative of the desire of the representatives of the carrier to disregard that portion of the agreement covering investigations in its entirety. Such action, in our opinion, is comparable to Kangaroo Court persecution. That cannot be condoned by this committee, and you are hereby requested to reinstate Brakeman L. L. Price immediately with all rights unimpaired and to reimburse him for any and all losses in earnings that may have accrued

as a result of these above referred to actions on the part of the carrier's representatives.

I shall appreciate your investigation, advising.

Very truly yours,

L. E. Foley,

General Chairman—BRT.

LEF:dl

cc: Mr. L. L. Price

Mr. E. C. Grounds

Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "F"

Union Pacific Railroad Company
Department of Operation

At Milford, Utah

March 30, 1950

011.221

Mr. L. E. Foley

General Chairman, BRT

225 Bartlett Building

215 West Seventh St.

Los Angeles 14, Calif.

Dear Sir:

Referring to your letter of March 27, file 7-P-37, regarding the case of Brakeman L. L. Price, requesting reinstatement with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

Brakeman Price was dismissed from service for

refusing to protect his assignment as swing brakeman at Nipton, California, on July 12, 1949, and deadheaded from Nipton to Las Vegas, Nevada without authority, constituting violation of Operating Rule 702. The violation for which Brakeman Price was dismissed was a serious one. He apparently had no sense of responsibility, and investigation was held covering his violation and the only reason he did not participate in that investigation is because he elected not to, as he was given every opportunity to do so.

If there is any merit to your claim, it is not understood why you elected to delay your request for a period of over eight months for his reinstatement on the basis outlined. There is possibly a reason for so handling; if there is, I shall be glad to receive advice as to what it is, as I have met with you in conference a number of times since the occurrence.

Believing the discipline has had the desired effect, I am agreeable to return Brakeman Price to service on a leniency basis.

Yours Truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "G"

April 5, 1950

File 7-P-37

Mr. F. C. Paulsen
General Manager
Union Pacific Railroad Company
10 South Main Street
Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

This will acknowledge receipt of yours of March 30, 1950, your file 011.221, with reference to the above captioned case, the second paragraph of which sets forth your reasons for the dismissal of Brakeman Price. However, it does not explain why a so-called investigation was conducted without affording Brakeman Price an opportunity to secure a representative of his choice.

The third paragraph of your letter indicates possible exceptions being taken to the delay in the handling of this case. If there is no merit to our claim, I am at a loss to understand what difference any delay connected therewith would make.

Notwithstanding these differences, this will advise that this committee cannot accept your proffer to reinstate Brakeman Price on a leniency basis and the case will be docketed for discussion in our next conference.

Very truly yours,

L. E. Foley,
General Chairman—BRT.

LEF:dl

cc: Mr. J. O. Blackford
Mr. E. R. Johnson

EMPLOYEES' EXHIBIT "H"

Union Pacific Railroad Company
Department of Operation

Salt Lake City 1, Utah
May 22, 1950

O11.221

Mr. L. E. Foley
General Chairman, BRT
1129 Bartlett Building
215 West Seventh St.
Los Angeles 14, Calif.

Dear Sir:

Referring to my letter of March 30, File 011.221, and our conference today relative to the case of Brakeman L. L. Price whose reinstatement you request with all rights unimpaired and pay for all time lost subsequent to July 13, 1949:

As stated to you in conference, Brakeman Price automatically severed his relationship with the Company when he walked off his assignment. It was my thought the discipline assessed would have the desired effect and I agreed to return Brakeman

Price to service on a leniency basis. I am not in a position to accede to your request that he be paid for all time lost. To do so would indicate I was agreeable to permitting employes to perform as they saw fit, regardless of how it affected the operation or welfare of the organization as a whole.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "I"

May 31, 1950

File No. 7-P-37

Mr. F. C. Paulsen

General Manager

Union Pacific Railroad Company

10 South Main Street

Salt Lake City 1, Utah

Re: Brakeman L. L. Price—request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

Dear Sir:

Your letter of May 22, 1950, your file 011.221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22, is not acceptable. The committee's contention, as set forth in our letter of March 27, 1950, that Brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33

of the agreement effective April 1, 1943, has not changed.

You are, therefore, hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time, and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

Very truly yours,

L. E. Foley,
General Chairman—BRT.

LEF:dl

cc: Mr. J. O. Blackford
Mr. E. R. Johnson

EMPLOYEES EXHIBIT "J"

Union Pacific Railroad Company
Department of Operation
Salt Lake City 1, Utah
July 5, 1950

011.221

Mr. L. E. Foley
General Chairman, BRT
1129 Bartlett Building
Los Angeles 14, California

Dear Sir:

Your letter May 31st, file 7-P-37, captioned as follows:

"Brakeman L. L. Price—request for reinstate-

ment with all rights unimpaired and pay for time lost subsequent to July 13, 1949.”

In conference held at Los Angeles, June 30, 1950, we were unable to agree upon a Joint Statement of Facts in this case, and I understand it will be submitted to the First Division, NRAB, by the employees *ex parte*.

Yours truly,

/s/ F. C. Paulsen.

EMPLOYEES' EXHIBIT "K"

National Mediation Board
Washington

Mediation Agreement—Union Pacific Railroad Company (South-Central District) (Carrier) and Brotherhood of Railroad Trainmen (Organization)

In settlement of differences as set forth in an application for mediation as described in Docket Case No. 3172, dated July 6, 1949, of the National Mediation Board and under the provisions of the Railway Labor Act, amended on June 24, 1934, it is mutually agreed that the question so submitted by the said Brotherhood of Railroad Trainmen to the said Union Pacific Railroad Company, South Central District, is hereby disposed of in the form of an agreement, a copy of which is attached hereto but not made a part hereof, as follows:

“Agreement dated July 15, 1949, providing for

establishment of away from home terminal for swing brakemen at Kelso, California, and related issues in connection therewith."

The above constitutes full and complete settlement of issues involved.

Signed at Salt Lake City, Utah, this 15th day of July, 1949.

For The Carrier:

/s/ By F. C. Paulsen,
General Manager.

For The Employees Represented by The Brotherhood of Railroad Trainmen:

/s/ By D. A. MacKenzie,
Asst. President.

[Seal]

Witness:

/s/ James L. Haloren,
Mediator, National Mediation
Board.

Swing Brakemen

It is agreed:

1. This agreement applies to brakemen in excess of two (hereafter referred to as swing brakemen) used on through freight trains between Las Vegas, Nevada and Kelso, California, in accordance with applicable provisions of State Laws.

2. Las Vegas, Nevada is established as the home terminal and Kelso, California the away from home terminal for swing brakemen covered by this agreement.

3. Swing brakemen working between Las Vegas, Nevada and Kelso, California, shall work and be paid in accordance with existing rules and regulations applicable to them, except as provided in Sections 4, 5 and 6, hereof.

4. (a) For application only to swing brakemen where Kelso is the away from home terminal, held away from home terminal time shall be paid in accordance with Article 14, Section (a) of the agreement effective April 1, 1943, as revised by the National Agreement dated at Chicago, November 14, 1947 and effective January 1, 1948, except that in the first 24-hour period, pay for held away from home terminal time shall start to accrue at the expiration of 12 instead of 16 hours and no allowance shall be paid for the 20th to 24th hours, inclusive. Article 14(a) shall otherwise apply.

(b) This variation in the application of the held away from home terminal time rules shall apply only to swing brakemen and shall not constitute a precedent in the application of the rules nor be cited by the employees hereafter as a basis for requesting the same consideration for any other employees.

5. Under this agreement, swing brakemen shall be used from the brakemen's extra board at Las Vegas, Nevada, working first-in first-out in conjunction with other brakemen on that extra board. This swing brakemen service shall be considered unassigned service and the daily guarantee pro-

vided for in Article 32(a) of the schedule agreement shall not apply.

6. Under this agreement, when no swing brakemen are available at Kelso, it shall be permissible to transfer a swing brakeman from a train moving in one direction to a train moving in an opposite direction at the meeting point of the two trains, or a station reasonably close, in which event swing brakemen shall be paid on a turnaround basis calculated from time of reporting for duty at the initial terminal station until released from duty at that station.

7. Nothing herein shall be construed as superseding any provision of existing agreement except as specifically provided herein.

8. This agreement shall be effective July 18th, 1949, and shall terminate thirty days after written notice served by either party upon the other.

Union Pacific Railroad Company,

/s/ By F. C. Paulsen,
General Manager.

Brotherhood of Railroad Trainmen,

/s/ By L. E. Foley,
General Chairman,

/s/ By D. A. MacKenzie,
Asst. President.

Salt Lake City, Utah, July 15, 1949.

National Railroad Adjustment Board
First Division

April 10, 1951

Docket No. 27393

Parties to dispute Brotherhood of Railroad Trainmen vs. Union Pacific Company (South-Central District)

EMPLOYEES' REBUTTAL TO CARRIER'S
SUBMISSION

Statement of Claim: Claim for restoration to service with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949.

Employees' Rebuttal to Carrier's Submission: That portion of the carrier's statement of facts reading as follows:

"Prior to July 12, 1949 and subsequent thereto, the third brakeman required on freight trains under Nevada law was called from the brakemen's extra board. The brakeman accompanied the train westward from Las Vegas, Nevada to Nipton, California, left the train at the latter point and then accompanied an eastbound train from Nipton, California to Las Vegas, Nevada as directed by the train dispatcher."

while briefly explained on pages 20 and 21 of the carrier's submission, is somewhat misleading as the language "prior to July 12, 1949" indicates an indefinite prior period when the facts are that swing

brakemen had been required to detrain at Nipton, California, only subsequent to June 27, 1949, as will be noted on page 3 of the carrier's submission (see date of Superintendent's Circular No. 77). This action was vigorously protested by the employees as will be noted by the fact that the services of the National Mediation Board were requested on the basis of the carrier's disregard for section (b) of Article 32 reading as follows:

"Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available."

For some months prior to June 27, 1949, swing brakemen had been detrained at Kelso, California, where eating and sleeping accommodations were available. This method of handling swing brakemen was restored on July 15, 1950, with the conclusion of Mediation Agreement 3172 (Employees' Exhibit K).

The carrier's complaint that the employees did not assert that the claimant was not guilty of rule violations as charged appears to be far reaching. Assuming that under the agreement the employee's guilt should be established by a fair hearing in accordance with the provisions of the agreement, no employee is guilty until such time as reasonable evidence sustaining the charges has been heard, and without such an investigation, it appears obvious that the guilt of the claimant in this case was not established and that such an assertion from the employees would have served only to reiterate an obvious, reasonable fact.

The carrier lays heavy stress upon the alleged charges that the claimant refused to protect his assignment and refused to obey instructions, asserting that the claimant was instructed to deadhead from Las Vegas to Nipton and to perform service as a swing brakeman on extra 1622 east from Nipton to Las Vegas. The employees contend that the claimant did precisely as instructed. He deadheaded to Nipton and returned to Las Vegas for food after receiving instructions that the train on which he was to swing from Nipton to Las Vegas would not arrive at Nipton until approximately 4:00 a.m. on the following morning. He was ready and willing to fulfill his assignment by returning to Nipton on a freight train known as symbol MLA. Such is again in support of the employees' contention established in the so-called transcript of investigation as indicated on pages 9 and 10 of Employees' Exhibit A in the following questions and answers:

"What conversation did you have with Brakeman Price?

A. First of all he said, this is Brakeman Price. He said, I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton."

"Q. It was your understanding that he returned deadhead from Nipton on the MSF train, leaving there about 11:10 p.m. and arriving Las Vegas shortly after midnight?

A. Yes, sir.

“Q. You instructed him he definitely was not to return to Nipton?

A. That is right. I told him exactly, it would not be necessary.”

“Q. You made it very plain to him?

A. Yes, sir.”

“Q. Was he arbitrary with you on the phone?

A. No, sir.”

It will be noted that the claimant registered in and tied up at Las Vegas only after he had been definitely instructed not to return to Nipton to perform services as swing brakeman on extra 1622 east. Consequently, the claimant did not refuse to do what he was told unless it could be construed that he did secure food when he was told not to; however, the record does not indicate definitely that he was instructed not to secure food. The record does indicate that he secured the food without in any way affecting the efficiency of his performance as instructed by the carrier.

The carrier insists that there were adequate eating and sleeping accommodations at Nipton, as indicated in their statement and on page 20 of their submission, reading as follows:

“There were, of course, adequate eating and sleeping accommodations at Nipton, * * *

The employees contend there were no eating accommodations at Nipton whatsoever between the hours of 8:00 p.m. and 6:00 a.m., and the carrier's operating officers were well aware of this fact. In support of the employees' contention, we insert herein

a copy of a notice dated July 2, 1949, and signed before a Notary Public. This notice was furnished to the local officers of the Brotherhood of Railroad Trainmen representing the brakeman involved and reads as follows:

“July 2, 1949
Nipton, Calif.

“Brotherhood of Railroad Trianmen
Las Vegas, Nev.

“To Whom It May Concern:

“This is notice that there will be no meals served at Nipton Hotel between the hours of 8:00 p.m. and 6:00 a.m. daily unless agreement is reached providing a minimum of \$200.00 a month revenue from rooms and I will notify Brotherhood of Railroad Trainmen of such agreement.”

(Original signed),
Mrs. J. N. Morrow.

[Seal] (Signed) Mozelle H. Purcell, Notary.

“My commission expires July 7, 1952.”

“Witness”—(Signed) C. Purcell.

The carrier's exception to the employees' statement that it is questionable whether the services of Brakeman Price as swing brakeman were needed at all at Nipton on the date in question and that no other brakeman was sent from Las Vegas to protect the services originally intended for Brakeman Price, is also misleading. The carrier's assertion, “The reason Brakeman Price's services were not utilized for the services originally intended was be-

cause Brakeman Price refused to perform that service as instructed," is not supported by the evidence adduced in their own so-called investigation. The following statements support the contention of the employees:

"Q. Mr. Smith, on my instructions did you contact the Timekeeping Bureau at Los Angeles and have them ascertain from the records of the Company on file at that point who was the Swing Brakeman, shown by Conductor L. T. Robertson, on X 1600 W, symbol 4-MLA-8, departing Las Vegas 1:15 a.m., July 13th, 1949?

A. Yes, sir.

"Q. Who was the Swing Brakeman shown by Conductor Robertson?

A. Brakeman G. E. White.

"Q. And did you have them advise also who the Swing Brakeman was shown by Conductor W. E. Montgomery, on X 1622 E, from Nipton to Las Vegas, on that date?

A. Yes, sir. That was also Brakeman G. E. White."

It will be noted that Swing Brakeman White was used on extra 1600 west, symbol 4-MLA-8, departing from Las Vegas at 1:15 a.m., which was the one and same MLA on which the claimant was ready to return to Nipton, but he was instructed not to return on that train. Obviously the dispatcher knew that the claimant's services were not needed at Nipton as Brakeman White apparently arrived at Nipton well in advance of the time that it was

expected the claimant's services would be needed, as it is noted that Brakeman White was used on extra 1622 east from Nipton to Las Vegas, the train for which the claimant was originally deadheaded to Nipton's supposedly to protect from that point. This affirms the employees' statement that no other brakeman was sent from Las Vegas to protect the service intended for the claimant from Nipton. It apparently was not necessary to send an additional brakeman to Nipton in lieu of the claimant herein referred to. Consequently, the actions of the claimant, from an operational standpoint, were precisely what the operating officers of the railroad wanted. Had Brakeman Price not returned to Las Vegas for food, it would have been necessary for the carrier to have deadheaded some brakeman from Nipton to Las Vegas. The carrier's assertions in this event are indicative of their failure to comprehend the real situation involved in this particular instance, or they are not interested in presenting the real facts to your Honorable Board.

The carrier's indicated attempt to white-wash their method of conducting investigations without any consideration for the provisions of the agreement under which the claimant was working is evidenced by their assertion in that portion of the carrier's alleged to be unchallenged facts as noted in items 5 and 6 on page 10 of the carrier's submission, reading as follows:

“ * * * and instructed to appear for investigation and hearing at 10:00 a.m. July 17th, at the

office of the Assistant Superintendent at Las Vegas, Nevada.

“6. The Claimant appeared at the Assistant Superintendent’s office as directed in the notice of charges, and after the investigation and hearing had started, he requested postponement for the purpose of obtaining a representative. Request for postponement was granted until 9:30 a.m. the following day, July 18th. On the following day, July 18th, the Claimant requested the investigation and hearing be indefinitely postponed.”

and does not appear to be consistent with the evidence adduced at the carrier’s so-called investigation over which they had full control without opposition. The statement of one, Mr. S. M. Smith, is disclosed on pages 8 and 9 of Employees’ Exhibit A as follows:

“Q. Mr. Smith, did Mr. Price volunteer any information to you as to why he did not have his representative at 10:00 a.m., July 17th, for the investigation, as it has been stated by Chief Crew Dispatcher Dixon his representative was in town?

A. He stated the reason he wanted the investigation postponed until July 18th was because his witness, Brakeman L. L. Cook, was called for 10:00 a.m., July 17th, and he didn’t want to have to pay him for laying off to attend the investigation as his witness.”

The carrier would imply that the request for the

first postponement was for the purpose of securing a representative of the claimant's choice who was available on the date originally set for the investigation, when the facts are that the first postponement was definitely requested because of the fact that important witnesses, whom the claimant considered necessary to establish the facts regarding the charges against him, were not available on this particular day. The carrier's position that witnesses produced by the claimant would be at his expense most assuredly had some effect upon the claimant's endeavoring to have such witnesses present without being required to pay for the time they might lose. The carrier's assertion that the second postponement was requested for an indefinite period appears to be erroneous as the second postponement was requested until such time as the representative of the claimant's choice could be present, wherein the claimant named the Local Chairman of the Brotherhood of Railroad Trainman as his choice of representative. The carrier was well aware of the whereabouts of the Local Chairman and about when he would return and be available.

The carrier, in their attempts to justify their actions in this case, depends heavily upon the evidence adduced at their so-called investigation at which the employee or his representative had no opportunity to cross-examine witnesses or to introduce their own witnesses and it appears only reasonable that your Board should have the benefit of the written statement of the claimant in his request for the

services of his local lodge in handling his grievance, a copy of which follows:

“Las Vegas, Nevada
July 27, 1949

“Mr. Claude Thompson, Mr. E. C. Grounds,
Death Valley Lodge No. 781, Las Vegas, Nevada.

“Gentlemen:

“Please accept this as a statement of facts pertaining to my discharge from the services of the Union Pacific Railroad and a request for Lodge action for my reinstatement with pay for all time lost and all seniority and all rights restored.

“Brakeman L. L. Price was called July 12, 1949, to deadhead on Train No. 37, Las Vegas, Nevada, to Nipton, California, as a swing brakeman.

“No. 37 departed from Las Vegas at 9:15 p.m., July 12th, arriving in Nipton, California at 10:30 p.m., July 12th.

“Brakeman Price, on arrival at Nipton, California, called the C.T.C. Dispatcher on the C.T.C. telephone as per instructions.

“The Dispatcher advised Brakeman Price that Extra 1622 East, the train he was to swing back to Las Vegas, Nevada, would not arrive at Nipton, California, until 4:30 a.m. or 5:00 a.m. July 13th, 1949.

“Brakeman Price advised the Dispatcher that there were no eating facilities open at Nipton, California, between the hours of 8:00 p.m. and 6:00 a.m., and that he would return to Las Vegas, Nevada, on

the first Las Vegas bound train, to obtain food.

“Brakeman L. L. Cook was head brakeman on Extra 1623 East, which train was then in the hole at Bryant for No. 37 and Brakeman Cook was endeavoring to communicate with the C.T.C. Dispatcher and heard the conversation between the C.T.C. Dispatcher and Brakeman Price and can verify the facts of this statement.

“Brakeman Murphy was called as swing man, Nipton, California to Las Vegas, Nevada, and was present at Nipton, California. He heard all statements made by Brakeman Price and can verify that Brakeman Price endeavored to buy food at the hotel in Nipton and was told by the management of the hotel that no food was available between the hours of 8:00 p.m. and 6:00 a.m. and that the management of the Nipton Hotel had notified the Union Pacific Railroad in writing, that no food was available for Union Pacific Railroad Brakeman between the hours of 8:00 p.m. and 6:00 a.m.

“Brakeman L. L. Price deadheaded from Nipton, California to Las Vegas, Nevada on Extra 1623 East arriving at Las Vegas at 12:35 a.m., July 13th.

“Brakeman Price obtained food and then advised the Chief C.T.C. Dispatcher by telephone at the Union Pacific Railroad Yard Office that he had obtained food and was ready and willing to return to Nipton, California, on the M.L.A. called to leave Las Vegas at 1:45 a.m., July 13th.

“The Chief Dispatcher advised Brakeman Price that he need not return to Nipton, California.

“Brakemen G. E. White, L. L. Cook, F. M. Murphy, R. P. Johnson and several others were present and can verify that Brakeman Price called the Chief Dispatcher and advised him of being ready and willing to return to Nipton on the M.L.A.

“After being told that he need not return to Nipton, Brakeman Price registered in and went home.

“Brakeman G. E. White, swing Brakeman on the M.L.A. arrived at Nipton at 4:00 a.m., July 13, and Extra 1622 East, the train Brakeman Price would have been used on had he been instructed by the Chief Dispatcher to return to Nipton, arrived at Nipton at 6:40 a.m. July 13th.

“Brakeman Price was held out of service on instruction of Assistant Superintendent W. B. Groome at 9:05 a.m. July 13th.

“Brakeman Price was notified at 7:00 p.m., July 16, to be present at hearing to be held at 10:00 a.m. July 17th.

“Brakeman Price was present at said hearing and requested and was granted a postponement until 9:30 a.m., July 18th, due to the fact that witnesses G. E. White and L. L. Cook were out of town on the Moapa Local.

“Brakeman Price was present at the office of Assistant Superintendent Groome at 9:30 a.m. July 18th, and requested postponement of the hearing until his representative, Mr. E. C. Grounds, was in Las Vegas.

“Assistant Superintendent Groome advised Brakeman Price that he could not grant further postponement of the hearing.

"Brake man Price requested Mr. Groome's Chief Clerk, Stan Smith, to type a written request of postponement and Stan Smith did so.

"Brakeman Price signed said request and handed it, in person, to Mr. Groome.

"Mr. Groome advised Brakeman Price verbally that unless Brakeman Price was advised otherwise, the hearing would be held at 2:30 p.m. July 18th.

"Brakeman Price received a letter from Superintendent Wengert on July 27th, 1949, advising him that he was discharged from the Company's service.

"Copies of said letter and others are attached hereto.

"Action on this matter is respectfully requested due to violation of Art. 33A of our current schedule, effective April 1, 1943.

"Respectfully yours,"

(Signed) L. L. Price

The employees further contend that the carrier disregarded the agreement under which they work and its application in regard to the controversy herein involved when they dismissed the claimant from the their service. In support of this contention, the employees offer the following indicated actions on the part of the carrier:

1. The carrier's attempt to establish a terminal in the middle of an established district without negotiations.

2. The carrier's attempt to detrain brakemen at a station en route without satisfactory eating and

sleeping facilities without regard to the provisions of the agreement.

3. The carrier's method of conducting the investigation.

4. The carrier's removal of the claimant from service in violation of the agreement under which he was employed.

To defend or support the carrier's position in this case would make it appear justifiable for a carrier to arbitrarily, without negotiation, change the working conditions of its employees in a manner that would subject them, without recourse, to exposure at a station en route in desert terrain infested with scorpions, rattlesnakes, and other insects of the desert, without even affording them an opportunity to obtain ice water, and, in the event employees object or endeavor to secure release from these conditions upon their own initiative, to remove them from service without any regard for the provisions of their agreement and, as in this particular case, without conducting a thorough investigation. The employees contend that such actions, as herein related, on the part of the carrier are indicative of retaliatory measures taken, on account of the employees seeking relief through the request of their organization for the services of the National Mediation Board, in discharging this claimant from the services of the company without any recourse.

The employees urgently request that your Board

give consideration to their contentions and sustain their position with an affirmative award.

Brotherhood of Railroad Trainmen, Union Pacific
Railroad Company (South-Central District).

/s/ By L. E. FOLEY,
General Chairman.

Award 15509
Docket 27393

NATIONAL RAILROAD ADJUSTMENT
BOARD

First Division

39 South La Salle Street, Chicago 3, Illinois
With Referee A. Langley Coffey

Parties to Dispute:

Brotherhood of Railroad Trainmen Union Pacific
Railroad Company (South Central District).

Statement of Claim: "Claim for restoration with all rights unimpaired and for pay for all time lost for Brakeman L. L. Price since July 13, 1949."

Findings: The First Division of the National Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

Basically, the complaint is that the hearing was held when the claimant was not present.

The transcript of the hearing shows that at the appointed time and place the employe appeared without a representative. On the carrier being acquainted with the employe's desire to have his representative present and for no other reason assigned by the employe at the time, the hearing was postponed until the following morning by mutual consent. Neither the employe nor his representative appeared the next morning but the employe made written request for additional time "until my representative Mr. E. C. Grounds is in Las Vegas". The hearing was passed to the afternoon of the same day and claimant was notified to appear and be ready to proceed at that time. When he failed to appear the hearing was held in his absence.

The transcript shows that on the date when the hearing was originally set the employe's chosen

representative was off duty and as far as we know was in Las Vegas. No reason is assigned for his failure to appear, but his presence would have obviated the need of any postponement for the reason assigned. The employe, in connection with his request for further delay, told an officer of the carrier he did not want to proceed with the hearing on the first day because he would have been compelled to pay a material witness for time lost in order to have him present; that since the witness was scheduled to be off the next day he sought to avoid this expense by asking for the first postponement. We are left to speculate what would have happened if on the day following the hearing the witness was again on duty but the chosen representative was in from his assigned run.

It must be understood that there is no greater sanctity in the investigation rule than any other on the property. All rules are for the aid, guidance, and protection of responsible persons. The right of the employe to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. He cannot play fast and loose with the rule and expect its strict observance by others who too are accountable for failure to act promptly, justly, and in good faith.

It would have been more to the employe's credit if he had been forthright in the reason assigned for wanting the hearing delayed the first time. Also, his position here would have been strengthened had he personally appeared at all stages of the proceeding

to labor as best he could to preserve his record and to get his story to us first hand. All that the transcript reflects does claimant no credit, but leaves us with the feeling that the things of which he now complains were planned by him that way.

Award: Claim denied.

National Railroad Adjustment Board. By Order of
First Division.

Attest:

/s/ (Signed) J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois, this 25th day of June,
1952.

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Nebraska,
County of Douglas—ss.

A. J. VanDercreek, being first duly sworn, deposes and says:

My name is A. J. VanDercreek and I am an Assistant Vice president in the Department of Labor Relations of the Union Pacific Railroad Company with offices at Omaha, Nebraska. In such capacity I am an assistant to Mr. E. J. Connors who is Vice President, Department of Labor Relations. I have personal knowledge of the facts set forth in this affidavit.

Under date of January 15, 1951, by letter bearing the date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that Mr. L. E. Foley, General Chairman, Brotherhood of Railroad Trainmen, South-Central District of the Union Pacific Railroad Company, had submitted a dispute concerning the discharge of Brakeman L. L. Price to the National Railroad Adjustment Board. A true and correct copy of that letter is as follows:

“National Railroad Adjustment Board
First Division

39 South La Salle Street, Chicago 3, Illinois

January 15, 1951

“Mr. E. J. Connors, Vice President
Union Pacific Railroad Company—South
Central District

1416 Dodge Street

Omaha, Nebraska

Dear Sir:

U:1040

“We have received from General Chairman L. E. Foley, one ex parte submission in claim for restoration to service of Brakeman L. L. Price as shown in his letter of the 11th instant.

It is our understanding that you were given a copy of the submission by Mr. Foley. Pursuant to

the provisions of Circular B of October 14, 1949, you are requested to file by February 14, 1951, fifteen copies of your answer to the employee's submission and to give the General Chairman a copy.

Yours very truly,

/s/ T. S. McFarland,
T. S. McFarland,
Executive Secretary.

TSM/pk

Mr. W. P. Kennedy, Pres. BRT
cc: Mr. L. E. Foley, GC-BRT
1129 Bartlett Bldg.
215 West Seventh Street
Los Angeles 14, Calif."

Under date of April 13, 1951, by letter bearing that date and addressed to Vice President E. J. Connors by regular U. S. Mail and received in the office of the Department of Labor Relations of the Union Pacific Railroad Company at Omaha, Nebraska, the latter was advised by Mr. T. S. McFarland, then Executive Secretary of the First Division of the National Railroad Adjustment Board, that the file of the First Division, National Railroad Adjustment Board, in the dispute concerning the discharge of Brakeman L. L. Price, had been completed, that the parties to that dispute had waived oral hearing and that First Division Docket number "27393" had been assigned to that dispute. A true and correct copy of that letter is as follows:

“National Railroad Adjustment Board
First Division
39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

April 13, 1951

U-1040

“Mr. E. J. Connors, Vice President
Union Pacific Railroad Company
1416 Dodge Street
Omaha 2, Nebraska
Mr. W. P. Kennedy, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen:

“Our docket number has been assigned, as indicated, to the following Union Pacific Railroad Company and Brotherhood of Railroad Trainmen’s case, which was submitted ex parte and which has been completed:

“27393—Claim for restoration to service with all rights unimpaired * * * July 13, 1949.

“The parties waived oral hearing.

Yours very truly,

/s/ T. S. McFarland,
T. S. McFarland,
Executive Secretary.

TSM/em

cc: Mr. L. E. Foley, General Chairman, BRT”

Under date of December 5, 1952, there was received in the office of the Department of Labor Re-

lations of the Union Pacific Railroad Company at Omaha, Nebraska, through regular U. S. Mail, a letter purporting to be signed by "L. L. Price, Brakeman, Las Vegas, Nevada" and addressed to Vice President E. J. Connors. A true and correct copy of that letter is as follows:

"1400 Lewis Ave.
Las Vegas, Nevada
5 December 1952

"Mr. E. J. Connors
Union Pacific Railroad
Omaha, Nebraska

R.E.: F. C. Paulsen File No. 011.221
Railroad Adjustment Board
Award 15509 Docket 27393

Dear Sir:

"I appeal to you at this time for your consideration of my claim for reinstatement with full pay for time lost subsequent to July 13, 1949 with all rights unimpaired.

"Investigation of the facts in the records of my case would reveal that there is merit in my request after my claim has been heard and denied by the Railroad Adjustment Board.

"May I present these facts, substantiated by records available to you, for your consideration?

"1) Nipton, Calif. was not suitable for a swing brakeman to be tied up or held away from home terminal between the hours of 8 P.M. and 6 A.M. on July 12, 1949.

"2) I notified the C.T.C. Dispatcher, from Nipton, that I was returning to Las Vegas, Nevada to obtain food.

"3) I offered to return to Nipton on the M.L.A. to protect my assignment on Extra 1622 East.

"4) Brakeman G. E. White, swingbrakeman on the M.L.A., called to leave Las Vegas at 1:45 A.M. July 13, worked back to Las Vegas as swing brakeman on Extra 1622 East, the train I had been deadheaded to Nipton, on No. 37, to protect.

"5) No. 37 arrived at Nipton, Calif. July 12, 1949 at 10:30 PM Extra 1622 East departed Nipton, Calif. July 13, 1949 at 6:40 AM.

"6) I was advised, by C.T.C. Dispatcher:

a) At Nipton;

'he had advised Mr. Groom that the swing brakeman would be at Nipton for about 8 hours without a place to eat if he were deadheaded on No. 37'

b) At Las Vegas;

'swing brakeman G. E. White would reach Nipton on the M.L.A. in plenty of time to protect Extra 1622 East at Nipton and that it was not necessary for me to return to Nipton'

"7) I was present at the designated time and place for the investigation when called and consented to a postponement to the following morning because my two witnesses were out of town on the Moapa Local.

“8) E. C. Grounds, at that time Local Chairman of the B. of R. T. was a sufficient number of ‘times out’ on the brakemans Extraboard that, in his opinion, ‘he would be present as my representative the next morning.’ He advised me that if he were not for me to ‘request a postponement in writing until I am back in Las Vegas and ask White and Cook to layoff if they have to in order to be present at the investigation.’

“9) Grounds was in Milford, Utah in service of the Union Pacific Railroad as a brakeman, the following morning, July 18, 1949 I requested the postponement as per his instructions and my two witnesses White and Cook offered to layoff without pay until the investigation could be held as we were all concerned regarding the Nipton situation.

“10) The postponement, as I had requested, was refused and the investigation was held at 2:30 PM July 18, 1949 without me or anyone designated by me, being present.

“11) I was discharged as a result of that investigation.

“I ask your consideration of my claim at this time for two reasons:

“1) I was seriously injured in July 1944 in Union Pacific Railroad service and lost a year and ten days work at the peak of our earnings yet I settled my claim myself with our company for \$4500.00 which was less than I would have earned had I been able to work and a great deal less than

I would have received had I resorted to legal means to settle my claim.

“2) I am now prepared and am filing suit in Federal Court Jan. 5, 1953 unless I am reinstated with full pay for time lost prior to that date.

“With respect and appreciation for your consideration of this matter.

/s/ L. L. Price,
Brakeman,
Las Vegas, Nevada.”

On December 12, 1952, I addressed a letter to Mr. L. L. Price responding to his letter of December 5, 1952, addressed to Vice President Connors and quoted above. I signed Mr. Connors' name to that letter, being duly authorized so to do. A true and correct copy of the letter to Mr. Price, dated December 12, 1952, is as follows:

“Union Pacific Railroad Company
Omaha 2, Nebraska

E. J. Connors,
Vice President

December 12, 1952

011-221-P

“Mr. L. L. Price
1400 Lewis Avenue
Las Vegas, Nevada
Dear Sir:

“Your letter December 5th, appealing for consideration, your claim for reinstatement with full

pay for time lost subsequent to July 13, 1949, with all rights unimpaired.

“Your claim was submitted to the First Division of the National Railroad Adjustment Board under the provisions of the Railway Labor Act and denied by the Board in Award No. 15509.

“Mr. A. D. Hanson, General Manager, Salt Lake City, is the highest officer of appeal in discipline cases on the South-Central District, on which you were formerly employed.

Yours very truly,

/s/ E. J. Connors.

cc—Mr. A. D. Hanson

General Manager

Union Pacific Railroad Company

Salt Lake City, Utah”

The now deceased L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen on the South-Central District of the Union Pacific Railroad Company from February 24, 1947, to December 28, 1952, and in such capacity represented and handled grievances and other disputes under the provisions of the Railway Labor Act for employees of Union Pacific Railroad Company (South-Central District), including those employed as brakemen. Such handling included the prosecution of said grievances to the First Division of the National Railroad Adjustment Board. I have checked the records in my office and during the time Mr. L. E. Foley was General Chairman of the Brotherhood of Railroad Trainmen, he progressed approx-

imately 14 disputes or grievances to the First Division of the National Railroad Adjustment Board. Of this number, 3 were progressed to and handled before the said First Division prior to February, 1951.

/s/ A. J. VanDercreek.

State of Nebraska,

County of Douglas—ss.

Subscribed and sworn to before me, a Notary Public, this 8th day of May, 1956.

[Seal] /s/ Louis Scholnick.

My Commission expires May 10,
1960.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

I.

Defendant admits all of the allegations in Paragraphs I, II, and III of Plaintiff's Complaint.

II.

Answering Paragraph IV of the Complaint, Defendant admits all of the allegations therein, except Defendant expressly denies that Plaintiff duly performed all terms and conditions of the said agreements required on his part to be performed.

III.

Defendant denies each and every allegation and averment in Paragraphs V, VI, and VII of Plaintiff's Complaint.

Second Defense

For a further and second answer and separate defense to the Complaint, Defendant alleges as follows:

I.

Plaintiff, as a member of the Brotherhood of Railroad Trainmen, and acting under the provisions of the Railway Labor Act (45 U.S.C.A. Sec. 151 et seq.), and the terms and conditions of the collective bargaining agreement alleged in the Complaint, on or about the 27th day of July, 1949, requested Death Valley Lodge No. 781, Brotherhood of Railroad Trainmen, to take action for his reinstatement as an employee of the Defendant. Defendant further alleges that at the time of the discharge of the Plaintiff and the said written request by the Plaintiff for action in his behalf by the Brotherhood of Railroad Trainmen, and at all times mentioned in the Complaint, the Constiution, By-Laws and Rules of the said Brotherhood of Railroad Trainmen contained a provision relating to grievances, and authorization of the said Brotherhood by members, reading as follows:

"Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brother-

hood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, complaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

II.

Defendant further alleges that the said Brotherhood of Railroad Trainmen, acting pursuant to the written request of the Plaintiff, and pursuant to its Constitution, By-Laws and Rules, including the aforesaid authorization by the Plaintiff as a member of said Brotherhood, submitted the claim of the Plaintiff for restoration to service with all rights

unimpaired and for pay for all time lost, by letter to the Defendant dated October 29, 1949; that thereafter, Mr. L. E. Foley, General Chairman of the Brotherhood of Railroad Trainmen, with the knowledge and approval of the Plaintiff, requested the Defendant to join with the said Brotherhood in a submission of said claim to the National Railroad Adjustment Board pursuant to the provisions of the Railway Labor Act; that the said Brotherhood and the Defendant were unable to agree upon a statement of facts, and that the said claim was thereafter filed and docketed with the National Railroad Adjustment Board on the 11th day of January, 1951, with the knowledge and approval of the Plaintiff, acting by and through the Brotherhood of Railroad Trainmen. The Defendant filed and docketed its response to the Plaintiff's submission, and the Plaintiff subsequently filed and docketed with the National Railroad Adjustment Board his rebuttal to the Defendant's submission. Oral hearing was waived in the submission by the Plaintiff and was agreed to in the submission by the Defendant. Thereafter, the National Railroad Adjustment Board, First Division, on the 25th day of June, 1952, filed and docketed its findings and award, expressly denying the claim of the Plaintiff for restoration to service with all rights unimpaired and for pay for all time lost.

III.

Defendant alleges that the aforesaid award of the National Railroad Adjustment Board is final and

binding upon the Plaintiff and the Defendant in this action and constitutes a final and complete determination of all matters complained of by the Plaintiff in this action, and that the election of the Plaintiff to pursue the remedy provided by the Railway Labor Act and the said collective bargaining agreement constitutes a bar to the maintenance of the above entitled action by the Plaintiff.

Wherefore, Defendant prays judgment for Defendant and against the Plaintiff, for costs of suit herein, and for all proper relief.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,
/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

To: L. L. Price and his attorneys, Ralli, Rudiak & Horsey.

Defendant, Union Pacific Railroad Company, requests Plaintiff within ten days after service of this request, to make the following admission for the purpose of this action only, and subject to all perti-

nent objections to admissibility which may be interposed at the trial:

1. That at all times mentioned in the Complaint and pertinent to this action, the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen contained a provision relating to grievances and authorization of the said Brotherhood by its members reading as follows:

“Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary, each member of the Brotherhood of Railroad Trainmen grants full and complete authority to the said Brotherhood and any and all of its duly constituted representatives to act for him and in his name for the purpose of collecting, settling, compromising, amending, dismissing, or in any other manner disposing of any and all of his claims, complaints or grievances against his railroad and motor carrier employers, and authorizes the Brotherhood and its representatives to submit such claims, complaints or grievances for determination to any person, board or other tribunal provided by law or otherwise which to the Brotherhood or its representatives may be deemed necessary or advisable, and the Brotherhood and its representatives shall have full and complete authority to receive notice of hearings, if any, or to waive hearing, and to appear for, represent and act for its members before such person, board or other tribunal in connection with the consideration and determination of such claims, com-

plaints or grievances; provided, that any adverse action by the Brotherhood or its representatives on any such claim, complaint or grievance shall be subject to the appropriate right of appeal under the terms and limitations of this constitution."

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

DEPOSITION OF D. R. ALTIER

a witness herein, taken on behalf of defendant, at 2:00 p.m., Friday, July 20, 1956, at 215 West 7th Street, Los Angeles, California, before Edward A. Oreb, a Notary Public within and for the County of Los Angeles and State of California, pursuant to the annexed notice and stipulation.

Appearances of Counsel: For Plaintiff: Ralli, Rudiak & Horsey (no appearance). For Defendant: E. E. Bennett, Esq., Edward C. Renwick, Esq., Malcolm Davis, Esq., Calvin M. Cory, Esq., by Calvin M. Cory, Esq.

Reported by Edward A. Oreb, CSR.

(Deposition of D. R. Altier.)

Mr. Cory: This is the time fixed to take the deposition of Mr. Altier pursuant to stipulation entered into between the plaintiff and the defendant and a notice duly served upon the plaintiff of the taking of the deposition. Let the record show that Mr. Altier has been served with a subpoena and is testifying pursuant to a subpoena duces tecum.

D. R. ALTIER

a witness herein, having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Cory): Will you please state your name. A. Daniel R. Altier.

Q. Where do you reside, Mr. Altier?

A. 4059 Garden Avenue, Los Angeles 39.

Q. Are you the general chairman of the Brotherhood of Railroad Trainmen for this division?

A. I am for this district.

Q. For this district?

A. South central district.

Q. Will you please state for the record your official capacity?

A. General chairman, Brotherhood of Railroad Trainmen, Southwest District.

Q. Would that be Pacific?

A. Union Pacific Railroad.

Q. How long have you been general chairman, approximately?

A. Since December the 29th, 1952.

(Deposition of D. R. Altier.)

Q. Prior to that time did you hold a position with the Brotherhood of Railroad Trainmen?

A. I was local chairman representing yardmen in the Los Angeles terminal and also secretary of this full general—of the general committee.

Q. Do you have with you the file of the Brotherhood of railroad Trainmen with reference to the dismissal of Mr. L. L. Price by the Union Pacific Railroad Company?

A. I have the file, the necessary papers in answer to the subpoena served me.

Q. Has that file been in your possession since you assumed the office of general chairman?

A. Yes.

Q. Prior to that time, was that file in the possession of your predecessor Mr. Foley?

A. Yes, sir.

Q. And at all times has been in the possession of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. Now, referring to the file, will you please describe how this matter originated insofar as the Brotherhood of Railroad Trainmen are concerned? Let me rephrase the question.

Will you please state the date and nature of the first communication in your file?

A. Will you please read that question back to me first.

(The question was read by the reporter.)

Q. (By Mr. Cory): That would be this letter from Mr. Price to which is attached the date and

(Deposition of D. R. Altier.)

nature of the first communication in your file signed by Mr. L. L. Price.

A. Under date of July 27th, 1949, Las Vegas, Nevada, addressed to Mr. Claude Thompson and Mr. E. C. Grounds, Death Valley Lodge number 761, Las Vegas, Nevada.

The nature of the correspondence indicates that Mr. Price was advising the secretary of his lodge and his local representative the circumstances that resulted in his being discharged from the services of the Union Pacific Railroad Company.

Q. Does the letter to which you have just referred appear in the employes rebuttal submission on file with the Railroad Adjustment Board?

A. Yes, sir.

Q. Is there a letter in your file, Mr. Altier, from Mr. Thompson to your predecessor Mr. Foley?

A. There is a letter dated Las Vegas, Nevada, February 27, 1950, addressed to Mr. L. E. Foley.

Q. Will you read it?

A. "General chairman No. BRT, 215 West 7th Street, Los Angeles.

"Dear Sir and Brother:

The attached case of Brother L. L. Price for reinstatement with pay for time lost and all rights unimpaired was handled by local chairman E. C. Grounds and no satisfactory agreement reached with the superintendent. At a regular meeting of Death Valley Lodge number 781 held on February 26, 1950, the case was approved for further handling by the general chairman.

(Deposition of D. R. Altier.)

“Fraternally yours, C. W. Thompson, SNT, Secretary and treasurer, Lodge number 781.”

Q. Now, thereafter did Mr. Foley direct a letter to Mr. Price and if so what was the date of that letter?

A. The file indicates that on May 31, 1950, addressed to Mr. L. L. Price, 2400 Lewis Avenue, Las Vegas, Nevada, re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

“Dear Sir and Brother:

The above captioned case having been referred to this office by action of Lodge 781 on February 27th, 1950, has been handled in accordance with the by-laws of this organization up to and including a conference with the general manager in Salt Lake City on May 22, 1950, with no satisfactory adjustment agreed upon.

“I am attaching hereto a copy of my letter addressed to the general manager requesting that he join me in a submission of this case to the first division of the National Railroad Adjustment Board. At this time I desire to point out to you that the general manager in his conference on May 22nd, agreed to your reinstatement on a leniency basis. This proffer in my opinion was inconsistent with consideration given to you in the past and consequently was not accepted by the undersigned. However, I want it understood that you have the privilege of ordering this committee to settle your case as you see fit. Notwithstanding this, unless I hear

(Deposition of D. R. Altier.)

from you to the contrary, I shall proceed to make presentation of this case to the first division of the National Railroad Adjustment Board. As previously related to you we can always withdraw the case from the board in a settlement agreed to by both the carrier and the organization. It is my opinion that to best protect your interests, this case should be prepared for the first division of National Railroad Adjustment Board.

Fraternally yours, L. E. Foley, General Chairman BRT."

Q. Mr. Altier, will you please also read into the record the contents of the letter referred to by Mr. Foley? A. Dated May 31, 1950.

"Mr. F. C. Paulson, General Manager, Union Pacific Railroad Company, 10 South Main Street, Salt Lake City, Utah.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

Your letter of May 22nd, 1950, your file 011. 1221, setting forth your position relative to the above captioned case after our discussion while in conference in Salt Lake City on May 22nd is not acceptable. The Committee's contention as set forth in our letter of March 27, 1950, that brakeman Price was removed from service without a proper and thorough investigation provided for in Article 33 of the Agreement effective April 1, 1943, has not changed.

(Deposition of D. R. Altier.)

"You are therefore hereby requested to join us in a submission of this case to the First Division of the National Railroad Adjustment Board and to fix a date, time and place for our meeting in an effort to agree upon a joint statement of facts in connection therewith.

"Very truly yours, L. E. Foley, General Chairman—BRT."

Q. Now, what is the next communication in your file thereafter from Mr. Foley to Mr. Price if any?

A. Under date of January 12, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement [7] with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"The above captioned case having been prepared by this office for ex parte submission to the first division of the National Railroad Adjustment Board has been referred to the Brotherhood's statistical department, which department has approved such submission. The necessary copies of the submission have today been furnished to the secretary of the first division of the National Railroad Adjustment Board. Representatives of the carrier have 30 days in which to prepare their ex parte submission upon receipt of which this office will furnish the secretary of your lodge and the local chairman with a copy of both parts of the ex parte submission. You will be advised accordingly.

(Deposition of D. R. Altier.)

“Fraternally yours, L. E. Foley, General Chairman—BRT.”

Q. What is the next communication if any from Mr. Foley to Mr. Price?

A. Dated February 13, 1951, addressed to Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

“Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

“Dear Sir and Brother:

“Enclosed herewith is a copy of the carrier’s plea for a 30 day extension of time for the preparation of [8] their rebuttal to our submission of your case which letter is self-explanatory. I shall keep you fully advised of all future developments.

“Fraternally yours, L. E. Foley, General Chairman, BRT.”

Q. Will you please read into the record the copy of the letter referred to by Mr. Foley?

A. “Dated February 6, ’51,” addressed to Mr. T. S. McFarland, Executive Secretary, First Division National Railroad Adjustment Board, 39 South La Salle Street, Chicago, Illinois.

“Dear Sir:

“Referring to your letter dated January 15, 1951, your file U-1040 concerning ex parte submission received by you from general chairman L. E. Foley of the Brotherhood of Railroad Trainmen on behalf of brakeman L. L. Price and advising that carrier’s answer would be due by February 14, 1951,

(Deposition of D. R. Altier.)

it is necessary that carrier request an extension of time from February 14 to March 16 in which to file answer to the employee's ex parte submission in this dispute.

"Messrs. Kennedy and Foley are being advised of carrier's request by copy of this letter.

"Very truly yours," stamped "Original signed by E. J. Connors."

Q. What is the next communication if any from Mr. Foley to Mr. Price? [9]

A. It is dated April 14, 1951, addressed to L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir:

"Further in connection with my letter of January 12, 1951, with reference to the above captioned case this will serve to advise that the submission of this case has been completed. It has passed all statistical boards. Has been accepted by Division 2 of the National Railroad Adjustment Board and has been assigned docket number 27393. It will be heard in its proper turn before said board. All concerned will promptly be advised of the decision of the board on this case.

"Very truly yours, L. E. Foley, General Chairman, BRT."

Q. What is the next communication if any from Mr. Foley to Mr. Price?

(Deposition of D. R. Altier.)

A. "July 1, 1952, Mr. L. L. Price, 1400 Lewis Avenue, Las Vegas, Nevada.

"Re brakeman, L. L. Price request for reinstatement with all rights unimpaired and pay for time lost subsequent to July 13, 1949.

"Dear Sir and Brother:

"I am attaching hereto a copy of award number 15509 in disposition of docket number 27393 which represents your case as presented to the First Division of the [10] National Railroad Adjustment Board by this committee.

"It is with the deepest regret that I note this award denies your case in its entirety. I was of the opinion that your case was the best we had before this tribunal. While this decision is from the highest board provided for in the National Railway Labor Act as in many other matters of litigation, I share with you and no doubt others the feeling that no justice was accomplished in this decision. However, in reviewing the file I cannot think of any additional supporting facts which would have in any manner affected the decision in this case. May I at this time express my sincere appreciation for your co-operation in this matter. I assure you that this committee is very deeply concerned over this decision and sincerely shares with you the disappointment.

"Fraternally yours, L. E. Foley, General Chairman, BRT."

Q. Are there any additional communications from Mr. Foley to Mr. Price in your file?

(Deposition of D. R. Altier.)

A. I find none.

Q. Now, with the exception of the letter dated July 27th, 1949, signed by Mr. Price, is there any other communication in your file signed by Mr. Price? Well, let's see. Is there any other communication in your file to the Brotherhood of Railroad Trainmen signed by Mr. Price?

A. I find none.

Q. Is there any letter in your file signed by Mr. [11] Price requesting the Brotherhood of Railroad Trainmen to cease handling his case before the Railroad Adjustment Board? A. No, sir.

Mr. Cory: I have nothing further.

/s/ D. R. ALTIER,
Witness.

Subscribed and sworn to before me this 15th day of August, 1956.

[Seal] /s/ W. L. HEATHCOTE,
Notary Public in and for the County of Los Angeles, State of California. [12]

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO MOVE FOR SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT

The defendant, Union Pacific Railroad Company, a corporation, has heretofore moved the court to enter summary judgment in its favor, which motion was denied May 11, 1956. In view of admissions on the part of the plaintiff made subsequent to that date and in view of the contents of the deposition of D. R. Altier on file herein, said defendant now moves the court for leave to move again for summary judgment and also move the court for its order entering summary judgment for said defendant.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys.

You, and Each of You, Will Please Take Notice that on Friday, November 23, 1956, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, at the court room of the Honorable Roger T. Foley, Judge, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the defendant, Union Pacific Railroad Company, a corporation, will move the court for an order granting leave to make a motion for summary judgment and for an order granting summary judgment in favor of the defendant.

Said motion will be made pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted and that there is no genuine issue as to any material fact in the above entitled action.

Said motion will be based upon this Notice, together with the Memorandum of Points and Authorities in support thereof and the Memorandum of Points and Authorities in support of said original motion for summary judgment. Said motion will also be based on the affidavit of Calvin M. Cory attached to said original Motion and the other papers attached to and filed in connection with said original Motion. Said motion will also be based on the affidavit of A. J. VanDercreek and the affidavit of H. J. Reeser on file herein and also upon the deposition of D. R. Altier on file herein and the provisions of the Constitution, Bylaws and Rules of the Brotherhood of Railroad Trainmen, as set forth in defendant's request for admission on file herein.

Dated: October 30, 1956.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CALVIN M. CORY,

/s/ CALVIN M. CORY,
/s/ By MALCOLM DAVIS,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 6, 1956.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR
SUMMARY JUDGMENT ON BEHALF OF
DEFENDANT

The Defendant, Union Pacific Railroad Company, a corporation, by Cory, Denton & Smith, its attorneys, hereby moves the Court to enter Summary Judgment for the Defendant, and in support of said motion in accordance with the provisions of Rule 56(b) of the Rules of Civil Procedure, the Defendant refers this Court to the Affidavit of Calvin M. Cory attached to the original Motion for Summary Judgment on Behalf of Defendant, the certified copy of Plaintiff's Submission and Award No. 15509 in Docket No. 27393 of the National Railroad Adjustment Board attached to the Defendant's original Motion for Summary Judgment, the original copy of the so-called Agreement, effective April 1, 1943, between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen attached to Defendant's original Motion for Summary Judgment, the certified copy of Employee's Rebuttal to Carrier's Submission on file herein, all of the pleadings of record including the Answer of the Defendant, the affidavit of A. J. Vandercreek and the affidavit of H. J. Reeser on file herein, the deposition of D. R. Altier, General Chairman of the Brotherhood of Railroad Trainmen (South Central District) on file herein, the provisions of the Constitution, By-Laws and Rules

of the Brotherhood of Railroad Trainmen as set forth in Defendant's Answer and admitted by Plaintiff's failure and refusal to reply to Defendant's Request for Admissions on file herein. The Defendant further refers the Court to the attached Memorandum of Points and Authorities in support of this motion.

Notice of Motion

To: L. L. Price, Plaintiff, and Ralli, Rudiak & Horsey, His Attorneys:

You, and Each of You, Will Please Take Notice that on Monday, the 4th day of March, 1957, at 10:00 o'clock A.M. thereof, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Roger T. Foley, located in the Federal and Post Office Building at 301 Stewart Avenue, Las Vegas, Nevada, the Defendant, Union Pacific Railroad Company, a corporation, will move the Court for an order granting summary judgment in favor of the Defendant.

Said motion will be made pursuant to Rules 12(b) and 56, Federal Rules of Civil Procedure, on the ground that the Complaint fails to state a claim against this Defendant upon which relief can be granted, that there is no genuine issue as to any material fact in the above entitled action, and that the pleadings, affidavits, exhibits, deposition and admissions on file herein show that the Defendant is entitled to judgment as a matter of law.

Plaintiff's Complaint purports to state a cause of action based upon an alleged wrongful dismissal in violation of the terms of a certain collective bargaining agreement effective April 1, 1943, between the Brotherhood of Railway Trainmen and the Defendant.

This petitioning Defendant alleges that any judicially enforceable cause of action arising from the termination of the employment relationship between Plaintiff and the Defendant is now barred by the adjudication and determination of the validity of such termination by the National Railroad Adjustment Board under the terms and conditions of said collective bargaining agreement, and pursuant to and in conformance with the Railway Labor Act (45 U.S.C.A. Sec. 151, et seq.)

Said motion will be based upon this Notice of Motion, together with the Memorandum of Points and Authorities in support thereof attached hereto, the Affidavits of Calvin M. Cory attached to the original Motion for Summary Judgment and all other papers attached to or filed in connection with said original Motion for Summary Judgment; the affidavits of A. J. Vandercreek and H. J. Reeser, and the Deposition of D. R. Altier, all of which are on file herein, as well as the Constitution, By-Laws and Rules of the Brotherhood of Railroad Trainmen, as set forth in Defendant's Request for Admission on file herein, and all of the pleadings and papers on file herein.

Dated: January 21, 1957.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 21, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel of record, that at all times mentioned in the complaint, and pertinent to this action, the constitution of the Brotherhood of Railroad Trainmen contained the following sections:

“Dues—When Payable.

“Sec. 129. The dues of members shall be paid monthly in advance, before the first day of each month, to the treasurer, or collector (when such office exists), and shall be conditioned upon the class of certificate held in the Insurance Department, and shall not be less than the amount of the monthly assessment levied by the General Secretary and Treasurer on each certificate. All members admitted or readmitted must pay dues for the

month in which they are admitted or readmitted.”

“Expelled For Non-Payment of Dues.

“Sec. 141. Any member failing or refusing to pay his dues and assessments, as required by Section 129, becomes expelled without any notice or further action whatsoever and at that instant any and all insurance certificates held by him shall be void, and all rights and benefits of insurance membership shall cease and be determined. If a lodge advances a member money for the payment of dues, he shall be required to repay the same within the time set by the lodge for such repayment, or shall become expelled as for non-payment of dues. The minutes of the lodge should show the time set for the repayment of money so advanced for this purpose.

“Where it is proven that a member has been expelled and readmitted through the fraudulent action of the local treasurer without said member’s knowledge, said member shall be granted continuous membership.”

It Is Further Stipulated and Agreed that at all times mentioned in the complaint and pertinent to this action, Rule No. 5 of the Brotherhood of Railroad Trainmen read as follows:

“Consideration of Grievances.

“No. 5. Any member considering that he has

been unjustly dealt with by his employer, or that he is otherwise aggrieved or is denied compensation for time lost and expenses incurred by sustaining minor personal injuries in line of service, shall make a comprehensive statement of the grievance in writing containing all of the material facts necessary for a clear understanding of the grievance and present or mail the same to the secretary of his lodge for handling at the next regular meeting. The lodge shall then determine by a majority vote of the members present, employes of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the lodge will then authorize either the local chairman or the local grievance committee to lay the matter before the trainmaster, superintendent, or other proper officer, and use every means to effect a satisfactory settlement, and report his or their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member or a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officer of the company, but not thereafter. All grievances must be handled by the regular local grievance committee, or by the local chairman if the lodge so directs, before being referred to the general grievance committee for adjustment. Grievances pertaining solely to members employed on a particular road or division or bus line shall

be disposed of by a majority vote of the members of the lodge who are employed on such road or division or bus line; provided that at least five such members must be present to take action upon such grievance. On small systems where the office of general chairman is maintained, upon the request of all lodges on such systems, the President of the Brotherhood may issue dispensation permitting the general chairman to handle local grievances.”

Dated this 20th day of May, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Plaintiff.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Defendant.

Approved:

/s/ JOHN R. ROSS,
United States District Judge.

May 21st, 1957.

[Endorsed]: Filed May 21, 1957.

In the United States District Court
for the District of Nevada

No. 117

L. L. PRICE,

Plaintiff,

vs.

UNION PACIFIC RAILROAD, Defendant.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

The defendant's motion for summary judgment came on for argument this 22nd day of May, 1957, Calvin M. Cory appearing for the defendant, and Samuel S. Lionel appearing for the plaintiff, and the matter being argued and by the Court fully considered the Court finds from the pleadings, admissions, and affidavits on file that there is no genuine issue of any material fact and that the defendant is entitled to a judgment as a matter of law, and that such showing has not been successfully controverted by the plaintiff; now, therefore, and good cause appearing, it is

Ordered, that the motion of the defendant for summary judgment be and the same is hereby granted.

Dated at Las Vegas, Nevada, this 22nd day of May, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed May 24, 1957.

[Title of District Court and Cause.]

DOCKET ENTRY OF MAY 24, 1957

Filing & Entering Order Granting Motion for Summary Judgment. Judgment: Ordered that defendant's Motion for Summary Judgment be and the same is hereby granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that L. L. Price, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting defendant's Motion for Summary Judgment, entered in this action on May 24, 1957.

Dated this 21st day of June, 1957.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the originals filed in this Court, or true

and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant and the appellee, and they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of July, A.D., 1957.

[Seal] OLIVER F. PRATT,
Clerk,

/s/ By FRANCES PETTINGILL,
Deputy Clerk.

[Endorsed]: No. 15649. United States Court of Appeals for the Ninth Circuit. L. L. Price, Appellant, vs. Union Pacific Railroad, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: July 17, 1957.

Docketed: July 31, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15649

L. L. PRICE,

Appellant,

vs.

UNION PACIFIC RAILROAD,

Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17, the appellant hereby states that the point upon which he intends to rely in his appeal from the Summary Judgment herein is as follows:

1. The Court erred in holding that the award of the National Railroad Adjustment Board entitled the appellee to Summary Judgment.

(The appellant does not rely on any claim that he did not authorize the submission of his case to the National Railroad Adjustment Board.)

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 17, the appellant hereby designates the following portions of the record as material to the consideration of the appeal from the Summary Judgment herein:

1. Complaint.
2. Defendant's Answer to Complaint.
3. Motion for Leave to Move for Summary Judgment and for Summary Judgment and Notice of Motion, dated October 30, 1956.
4. Plaintiff's Submission and Award 15509 in Docket No. 27393 of the National Railroad Adjustment Board, attached to defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.
5. Order Granting Motion for Summary Judgment, filed May 24, 1957.
6. Notice of Appeal, filed June 21, 1957.
7. Statement of Points, served herewith.
8. Designation of Record on Appeal, under Rule 17.

/s/ SAMUEL S. LIONEL,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 30, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

In conformance with Rule 17 of the Rules of the U. S. Court of Appeals for the Ninth Circuit, the Appellee designates the following additional parts of the record which are material and which should be a part of the printed record:

1. Agreement between the Union Pacific Railroad Company and the Brotherhood of Railroad Trainmen effective April 1, 1943, and attached to defendant's original Motion for Summary Judgment filed July 12, 1955.

2. Motion and Notice of Motion for Summary Judgment on behalf of defendant, dated January 21, 1957, filed January 21, 1957.

3. Request for Admission served upon the plaintiff the 28th day of June, 1956, and filed July 6, 1956.

4. Affidavit of A. J. Vandercreek executed May 8, 1956, and filed on the 10th day of May, 1956.

5. Employees' Rebuttal to Carrier's Submission dated April 10, 1951, in Docket No. 27393 of the National Railroad Adjustment Board, First Division, attached to Defendant's Motion and Notice of Motion for Summary Judgment, dated July 12, 1955.

6. Deposition of D. R. Altier filed August 27, 1956.

7. Stipulation dated May 20, 1957, and filed the 21st day of May, 1957, concerning portions of the constitution and by-laws of the Brotherhood of Railroad Trainmen.

8. This designation.

Dated: July 31, 1957.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
CORY, DENTON & SMITH,

/s/ By CALVIN M. CORY,
Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 5, 1957. Paul P. O'Brien,
Clerk.

No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT JAMES MIMS.

MINSKY & GARBER,

608 South Hill Street,
Los Angeles 14, California,

Attorneys for Appellant.

FILED

DEC - 6 1957

PAUL P. O'BRIEN, CLERK



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No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT JAMES MIMS.

Jurisdictional Statement.

I.

Jurisdiction of the District Court.

18 United States Code, Section 3231, provides that:

“The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States.”

Appellant was charged in the United States District Court for the Southern District of California, Central Division, in Indictment No. 25354 of violating United States Code, Title 21, Section 174. (Illegal sale of narcotics.) [T. R. p. 1.]

II.

Jurisdiction of This Court Upon Appeal to Review the Judgment.

28 United States Code, Section 1291, reads:

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be made in the Supreme Court.”

28 United States Code, Section 1294, reads in part:

“Appeals from reviewable decisions of the District and territorial Courts shall be taken to the Court of Appeals as follows:

“1. From a District Court of the United States to the Court of Appeals for the Circuit embracing the district; . . .”

Appellant filed his Notice of Appeal on April 10, 1957 from the Judgment entered by the District Court on April 2, 1957. [T. R. p. 25.]

Statement of the Case.

Appellant was accused of the illegal sale of narcotics, violation of United States Code, Title 21, Section 174, in an indictment returned September, 1956. On October 24, 1956, appellant pleaded not guilty to Count 1 of the indictment. [T. R. p. 3.] The defendant proceeded to trial on December 5, 6 and 7, 1957, at which time he was convicted by a jury of the offense charged. [T. R. p. 7.] Thereafter, on motion for a new trial, the Court granted the said motion on the ground that the evidence did not warrant conviction. [T. R. p. 9.] A second trial was had on February 26, 27 and 28, 1957, at which time appellant was convicted by a jury of the offense charged in Count 1, as alleged in the indictment. [R. T.

p. 19.] On April 1, 1957, appellant was sentenced to a period of imprisonment of fifteen years on Count 1 of the indictment. [T. R. p. 24.]

The essential testimony brought out by the government at the trial was that of Federal Narcotics Agent Richards, Frank Sabbath, the alleged accomplice of the defendant (Mr. Sabbath had pleaded guilty to the same offense for which appellant was on trial, and had previously been convicted of a felony [R. T. p. 126, lines 22-25]), and Bonnie Barnett, a convicted perjurer. [R. T. p. 136, lines 19-23.]

Throughout the testimony reference was made to a Mr. Powell, also known as Reverend Powell, also known as Parnell. (Throughout this brief he will be referred to as Mr. Powell.)

Agent Richards testified that he had been told by Mr. Powell that if he called a certain telephone number he could make an arrangement to purchase narcotics. On September 14, 1956, at about 1:45 P. M. Agent Richards called this certain number and a woman answered. [R. T. p. 21, lines 11-14.] Agent Richards asked to speak to James Mims, and a male voice got on the telephone and said "I am Mims. What do you want?" The agent said that he was a friend of the Reverend's and that his name was Deacon Allen, and that he wanted to do some business. The voice said to call back in half an hour, which Agent Richards did. At the time of the second call, the voice said to come down to the place and they could talk, and an address was given. [R. T. p. 21, line 15, to p. 22, line 15.] Agent Richards then went to the address and he observed the defendant Mims looking out the window. [R. T. p. 22, lines 19, 20.] He had never seen the defendant Mims before but he recognized

him from a photograph that he had been given. [R. T. p. 23, line 3.] Agent Richards entered the premises and asked for Mims. The person who Agent Richards identified as Mims said Mims wasn't there but he would be there in a few minutes. Agent Richards sat down and a few minutes later he heard footsteps coming up the stairs and Mims got up from the living room and met Sabbath in the hallway. [R. T. p. 24, line 19, to p. 25, line 3.] Mims and Sabbath walked about half way into the hallway and engaged in a conversation [R. T. p. 28, lines 7-9], which Agent Richards testified that he could not hear. [R. T. p. 56, lines 6-9.] A few seconds later, Sabbath walked back to the entrance of the living room and spoke to Agent Richards. At that time Sabbath asked what Agent Richards wanted, and Agent Richards said he had \$150.00 to spend for some stuff, Sabbath said the price would be \$155.00, and Agent Richards said that all he had was \$150.00. Sabbath then said wait a minute and left Agent Richards and rejoined Mims down the hall. [R. T. p. 29, lines 5-10.] Agent Richards could not hear what Sabbath and Mims said to each other. A few seconds later Sabbath returned to the living room and said to Agent Richards that he would let him have it for \$150.00. Then Sabbath told Agent Richards to wait there and Sabbath left Agent Richards' sight. Meantime, Mims had returned to the living room. About a minute later, Sabbath came back to the living room and told Agent Richards to follow him, and they both walked and entered a room which was located on the west portion of the hallway. At that time Sabbath took out a small brown package and said, "Here is the stuff, open it." [R. T. p. 30, lines 11-21.] Agent Richards paid the \$150.00 to Sabbath while they were in the room. [R. T. p. 32, line 19.] While they were in the room there

was a knock on the door and a woman's voice hollered "Frank, I want to see you." And Agent Richards said, "I thought your name was Mims." and Sabbath said, "Well, they call me Mims sometimes." Sabbath said if he wanted any more stuff to call back the number that Agent Richards had received and ask for James Mims. [R. T. p. 32, line 8.] Agent Richards and Sabbath then left the room and Agent Richards walked down to the porch and later rejoined the other officers. [R. T. p. 32, lines 11, 12.] Agent Richards testified that after he left the room, he observed appellant Mims in the living room. [R. T. p. 32, line 22.] On cross-examination, Agent Richards testified that his office had no record of any kind on a James Mims. [R. T. p. 43, line 2.] He also testified that he did not hear any conversations between Mims and Sabbath [R. T. p. 56], nor did he see any package being exchanged between Mims and Sabbath. [R. T. p. 56, lines 10-12.] Agent Richards testified that he did not know what occurred in the hall. [R. T. pp. 56, 63.] Agent Richards further testified that at a later transaction he called the same phone number and asked to speak to James Mims. He was told that Mims wasn't there and he left a number where he could be called. Later, Sabbath called back and Agent Richards and Sabbath made another sale. [R. T. p. 69, lines 8-25; p. 70, lines 1-2.]

Frank Sabbath was then called and in general testified in the same manner to the sequence of events as Agent Richards had testified as to the happenings in the house. Mr. Sabbath said that his conversations with Mims were in relation to the sale of the narcotics to Agent Richards. Mr. Sabbath testified that when he entered the house, Mr. Mims met him and said, "This guy wants to see

you. See what he wants.” [R. T. p. 110, line 5.] Then Sabbath went and spoke to Agent Richards and Agent Richards said that he wanted to do some business. He wanted to get some stuff. Agent Richards said he had \$150.00 to spend. All this time Mims was in the hall. [R. T. p. 109, line 24; p. 110, line 20.] Then Sabbath went back and spoke to Mr. Mims and asked what would \$150.00 get and Mr. Mims replied half an ounce. [R. T. p. 110, lines 20-24.] Sabbath went back and told Agent Richards about the conversation and Agent Richards said okay. Then Sabbath testified that he went and got the narcotics from Mr. Mims. [R. T. p. 111, lines 1-25.] He said that Mr. Mims was standing in the hall and he gave Sabbath the heroin while they were standing in the hall. [R. T. p. 111, line 13.] Then Mr. Sabbath and Agent Richards went into another room where Mr. Sabbath transferred the narcotics to Agent Richards and received the money from Agent Richards. [R. T. p. 119, lines 3-11.] At this time, appellant Mims was sitting in the living room and Sabbath testified that after the sale was made and Agent Richards had left, he gave the \$150.00 to the defendant Mims. [R. T. p. 113, lines 2-17.] Also at this time Sabbath testified that Miss Barnett was also in the living room. [R. T. p. 113, lines 7-10.]

On cross-examination, the facts were brought out that Mr. Sabbath had pleaded guilty to Count 1 of the same indictment that appellant Mims was on trial for, and that Count 2 of that indictment had been dismissed by the Government. [R. T. p. 123; p. 124, lines 5-7.] Sabbath testified that he had been told that by pleading guilty he might be able to help himself. [R. T. p. 125, line 2.] It was further brought out that at the time

these events took place Sabbath was on probation for statutory rape. [R. T. p. 126; p. 127, lines 1-2.]

On cross-examination, Mr. Sabbath further testified that when he was originally arrested by the Police, he told them that his father had supplied the heroin that was used in the sale to Agent Richards on September 14, 1957. [R. T. p. 123, lines 10-12.]

Bonnie Barnett was then called by the prosecution and testified that she was the woman who answered the first phone call that Agent Richards made. However, she left the room at the time when Mr. Mims was speaking to Agent Richards and therefore could not testify as to the conversation. [R. T. p. 133, line 21.] After that phone call, she testified to a conversation between Mr. Mims and Mr. Sabbath at which time Mr. Mims told Sabbath "there was a man coming to pick up a package and that he owed him some money and he wanted him to give him the package, but not until he collected the money that the man owed Mr. Mims." At that time Miss Barnett testified that she saw appellant Mims give a package to Mr. Sabbath. [R. T. p. 134, lines 9-22.] Miss Barnett then testified that after Agent Richards came, she saw Sabbath hand a package to Mr. Richards and that this occurred in the living room of the premises. She also saw Agent Richards hand some money to Mr. Sabbath. [R. T. p. 135, lines 22-25.] She further testified that after Agent Richards left she saw Mr. Sabbath give the money to Mr. Mims. [R. T. p. 136, lines 14-16.] Then she testified that she had been convicted of perjury. [R. T. p. 136, line 23.]

When appellant Mims took the stand, he admitted that he had talked to the person called Deacon Allen when he first called and denied the second telephone conversation.

[R. T. p. 157, lines 7-18.] He admitted that he was in the house when Agent Richards came to the house. [R. T. p. 157, lines 21-23.] But he testified that he left the house after Sabbath got there. [R. T. p. 163, line 11.] He testified that he never gave any package to Sabbath but that Sabbath had a package on him when he came in. [R. T. p. 162, lines 6-25; p. 166, lines 19-21.] He testified that he never received any money from Sabbath that day and he also testified that he had no dealings in heroin with Sabbath or Agent Richards. [R. T. p. 166, lines 22-25.]

On direct examination appellant Mims was questioned as to his business dealings with Mr. Powell, the father of Frank Sabbath. These questions were objected to on the ground of irrelevancy and the objection was sustained.

When instructing the Jury, the Judge failed to give an instruction on the close scrutiny required to be used in weighing the testimony of accomplices and perjurers.

The questions presented are:

1. Is is reversible error to fail to instruct on the close scrutiny required to weigh the testimony of accomplices and perjurers where the only evidence connecting appellant with the crime is the testimony of the accomplice and perjurer?

2. Is it reversible error to restrict testimony as to business transactions between appellant and the father of the main witness for the Government where said transactions would show motive for falsifying testimony?

SPECIFICATIONS OF ERROR.

I.

The Court Erred in Failing to Instruct the Jury on the Fact That Testimony of an Accomplice Must Be Viewed With Extreme Caution and That Testimony of a Convicted Perjurer, Although Not an Accomplice, Must Also Be Viewed With Extreme Caution.

The Court's instructions on the testimony of witnesses is as follows [R. T. p. 215, line 25, to p. 218, line 25]:

"The witness is presumed to speak the truth. That applies to every witness that comes to the witness stand. But when they tell conflicting stories you have to reject the testimony of one or more and accept the testimony of one or more. In other words, you have to resolve the conflicts when the witnesses are in conflict, you take some and reject others.

"Now, a witness is presumed to speak the truth, but that presumption may be impeached. That is a legal word. It simply means, in effect, repelled, overcome, legally contradicted, so that you don't accept it any more. It may be impeached by many things.

"It might be impeached simply by reason of the base character of the witness who testifies. As reasonable men and women of adult years you will realize that there are people in life who are of such a character that you wouldn't accept their testimony just because of the kind of a person they are.

"You have heard the witnesses, and observed them. You are expected to size up the witnesses, to measure them somewhat as to the kind of people they are and to determine whether they are the type of person in whom you would have a lack of confidence because of the inherent gross character of the witness.

“You are expected also to see whether the witness’ testimony holds together in itself. Has that witness been one who has contradicted himself or herself? Has that witness at other times and places told different stories and, if so, what were the motivations.

“Consider also what the witness has to gain or lose or what the witness thinks he has to gain or lose from the testimony given in the case.

“When you consider the testimony of the defendant you measure it by the same standards as you measure the testimony of other witnesses, but you bear in mind the situation of a defendant. Likewise, you bear in mind the situations of these other witnesses.

“Sabbath, for instance, was a man who was charged in this same indictment. There are two counts, each of which would be subject to its own penalty if a defendant were convicted. The defendant Sabbath has testified to a story against the defendant Mims, and by ‘story’ I mean that in the sense of narrative. I am not trying to characterize it as either truth or fiction.

“Sabbath has given a narrative of the transaction, which is quite at odds with the narrative he gave of the transaction at an earlier time. There has been one charge dismissed.

“Now, does he feel, Sabbath, as he sat here on the stand, an obligation to go along with the story or narrative he gave here because of a desire to ingratiate himself with the authorities? Does he think he would do himself some good? Did he perhaps procure a dismissal of the one count by an offer to cooperate which, regardless of whether it was really an offer to cooperate, would be accepted by the Government as such, and the Government would be in the position of saying, ‘Well, here we have a penitent sinner who is going to cooperate with us. Let’s give him a break and dismiss one of the counts.’

“Was that the motivation of Sabbath in changing the story or was it the fact that Sabbath now is in prison and he was up here and if he testified falsely he would be subject to the pains and penalty of perjury, so he knew he had better tell the true story this time, regardless of what story he told to Richards earlier. Those are all questions which a jury will have to decide.

“If, when you decide them, you come to a frame of mind where you would say, ‘Well, I am just sure about it, that testimony of Sabbath is amply corroborated by the other witnesses and Sabbath was right,’ then there wouldn’t be any reasonable doubt.

“If you think, on the other hand, that Sabbath was wrong in the testimony he gave here you wouldn’t have any reasonable doubt. But if you find yourself in that frame of mind, where you just don’t know, after considering it you don’t feel that conviction of one position or the other, to where you can say that it exists to a moral certainty, then you would be in a state of reasonable doubt.”

No objection was made to the above charge.

It should be noted that at no time did the Court ever make mention of the testimony of Miss Barnett, nor is her name mentioned anywhere in the Court’s charge.

II.

The Court Erred in Forbidding Appellant to Inquire Into the Business Relationship Between Appellant and the Father of Frank Sabbath, the Main Witness for the Government.

The substance of the rejected testimony is as follows:

“Q. When was the first time that day that you had seen Reverend Powell? A. That morning, about 6:30.

* * * * *

Q. What did he come to your house about?

Mr. Ludlow: Your Honor, I am going to object to this. It is immaterial and irrelevant.

The Court: It calls for a conclusion. Sustained.”
[R. T. p. 148, lines 16-22.]

“Q. By Mr. Ridley: When he came to your house that morning did you have a conversation with him? A. Yes, sir.

Q. What was that about? A. He told me he was going to take that trust deed that he had given me and get me a house with it.

Mr. Ludlow: Well, your Honor, the question has been answered, but I object to that on the grounds of irrelevancy also.

* * * * *

The Court: Well, I think the business transaction and other areas of conduct than those of the subject matter of litigation are immaterial.” [R. T. p. 148, line 23, to p. 149, line 23.]

* * * * *

“Q. Well, how did you happen to get to the hotel? A. We were in my car. There was the suggestion we were to go out and look for a place. We were out all that morning looking for a place.

Mr. Ludlow: I would like to object to this now, your Honor. This is immaterial to the case on trial here.” [R. T. p. 150, lines 20-25.]

* * * * *

“The Court: Sustained.” [R. T. p. 151, line 22.]

* * * * *

“Q. (By Mr. Ridley): Prior to the time you got to the hotel, had you and Mr. Powell been in a fight or in an argument? A. Yes, sir.

Mr. Ludlow: Your Honor, I am going to object to that as immaterial . . .

The Court: . . . The objection is sustained and the answer is stricken and shall be disregarded.”
[R. T. p. 151, line 23, to p. 152, line 10.]

When these objections were sustained, trial counsel for the defendant attempted to make offers of proof to show why the evidence was relevant. [R. T. p. 151, lines 3-14; p. 152, to p. 153, line 10.] A reading of the offers of proof as they appear in the transcript and making reference to counsel’s opening statement shows that defendant offered to prove

“that what actually happened here was that the defendant was engaged in arguments and fights with the co-defendant, Mr. Frank Sabbath, his father, a Reverend Parnell, Reverend Powell, both being the same man, who contacted Mr. Richards regarding Mr. Mims, concerning some trafficking at his hotel, a hotel in which Mr. Mims himself had some interest that will be evidenced by documents that are already in the clerk’s possession.

“Further, that Mr. Powell, or Reverend Powell, contacted Agent Richards some time prior to the approach that is involved here, and at the time he did so, Mr. Mims had already been in several arguments, from as early as July, regarding monies that he had given to Mr. Powell for a non-existent building or a building that had been condemned, and had been fighting and squabbling regarding the money.

“That in order to get even with and set Mr. Mims up, that Mr. Powell went to Agent Richards in this building and talked to him regarding some narcotic or narcotic buy at a hotel on Tenth Street, I believe, that Mr. Powell owned.” [R. T. p. 18, line 9, to p. 19, line 2.]

ARGUMENT.

I.

Where Sufficient Evidence to Prove Guilt Beyond a Reasonable Doubt Is Entirely Lacking Without the Testimony of Accomplices and Perjurers It Is Reversible Error to Fail to Instruct on the Caution That Such Testimony Should Be Received by the Jury.

The highly prejudicial effect that the failure to instruct the Jury on the caution necessary to view an accomplice's testimony and upon the fact that a convicted perjurer's testimony must be viewed with extreme care, can best be shown by an analysis of the evidence that was actually presented at the trial by the accomplice and by the convicted perjurer.

The testimony of Miss Barnett, the convicted perjurer, is particularly enlightening. Miss Barnett testified that at the time Agent Richards came in the room, she and Mr. Mims were already present. Then Mr. Sabbath came in the room. She testified that she saw Mr. Sabbath and Mr. Mims have a conversation and that Mr. Mims then left the room; then Mr. Sabbath gave a package to Agent Richards; Agent Richards gave Mr. Sabbath some money and then he (Agent Richards) left. Miss Barnett testified she actually saw a package handed by Sabbath to Agent Richards in the living room. [R. T. pp. 135, 136.]

However, this testimony clearly is false as shown by an analysis of the testimony of two other Government witnesses, namely, Agent Richards and the accomplice Sabbath.

Briefly, Agent Richards testified that after Sabbath came into the premises, Sabbath and Mims walked down

a hallway leaving Agent Richards and Miss Barnett in the living room; that Agent Richards could not hear the conversation or see what was going on down that hallway; that Sabbath came back and had a conversation with Agent Richards and then went back down the hallway; that Sabbath then came back again and had a conversation and told Agent Richards to follow him to another room down the hallway where the transaction took place. [R. T. pp. 28, 29, 30.]

Agent Richards testified, "I would say, about a minute or so after that Sabbath again came back to this location, at this time he told me to follow him. He then walked to and then entered this room which is located on the west portion of the hallway. At that time he took out a small brown package and said, 'Here is the stuff, open it.'" [R. T. p. 30, lines 16-21.] Later Agent Richards testified that "Just around this time there was a knock on the door and a woman's voice hollered out, 'Frank, I want to see you.'" [R. T. p. 31, line 24, to p. 32, line 1.] Later Agent Richards testified that he paid the \$150.00 to Sabbath while they were in the room. [R. T. p. 32, line 19.] Then to the question where was Mims at that time, Agent Richards testified, "The door was closed. However, after I came out of the room I observed Mims in the living room." [R. T. p. 32, lines 20-22.] This testimony clearly shows that the transaction that took place between Agent Richards and Sabbath happened behind closed doors and that consequently Miss Barnett could not possibly have seen the exchange. Further, the testimony of Sabbath also corroborates Agent Richards' testimony in the fact that the transaction where the handing of package from Sabbath to Richards, and the receiving of the money, took place out of the sight of Miss Barnett. [R. T. pp. 112, 113.]

Miss Barnett also testified that Mims gave Sabbath the package before Agent Richards ever got on the premises. [R. T. p. 134, lines 11-14.] However, Sabbath in his testimony states that he did not get the package from Mims until after Agent Richards was on the premises [R. T. p. 111], and further, that at the time he received the package from Mims, he was standing down the hallway out the sight of everybody else. [R. T. p. 111.]

This analysis of the testimony of Miss Barnett clearly shows that she is mistaken in every material point that she testified to. Everything she testified to was in direct contradiction to what Agent Richards and Sabbath testified the facts were. Miss Barnett could not have seen the exchange between Richards and Sabbath, because Agent Richards testified that the door was closed when the exchange was made. [R. T. p. 32, line 21.] Further, Miss Barnett could not have seen Mims give Sabbath the package because Sabbath testified that the package was given to him by Mims in the hallway after Agent Richards came to the house and not before. [R. T. p. 111, lines 10-23.] Therefore, Miss Barnett was lying.

Of course, it is the question of whether the effect of Miss Barnett's lies could have affected the outcome of this trial that is before this Court now, and to ask the question is to answer it. It shows why a cautionary instruction should have been given. On analysis, it can be seen that Miss Barnett has not told the truth in any material part of her testimony. However, without the close analysis that her testimony should be subject to, her testimony seemingly, on its face, corroborates that of Agent Richards and of Mr. Sabbath. If the Jury does not closely scrutinize the testimony, they probably would miss the obvious discrepancies between her testi-

mony and the testimony of Agent Richards and Mr. Sabbath and only remember the general tenor of her testimony. That is, the testimony that she saw Mims give Sabbath the package; saw Sabbath give the package to Richards; and saw Sabbath give the money which he obtained from Richards to Mims. This testimony is especially damaging when we realize that the only other testimony that directly connects Mims to this transaction is that of the accomplice Sabbath, and, as will be shown, the accomplice Sabbath had good reason to lie on the stand. Therefore, perhaps the only reason that the Jury believed Sabbath rather than the defendant Mims was because he was supposedly "corroborated" by Miss Barnett.

Once it is seen that the testimony of Miss Barnett is completely fabricated, then the only testimony that connects appellant with the sale in this particular case is the testimony of the accomplice Sabbath. And, of course, here we are faced, at the threshold, with the fact that Mr. Sabbath has everything to gain and nothing to lose by testifying for the Government. As his own testimony showed, Mr. Sabbath, who had been charged in a two-count indictment, was allowed to plead guilty to only one count. And, as he further testified, he was sentenced to tens years on that count, which was later reduced to five years on motion for reduction of sentence after Mims was convicted. [See Supp. T. R. pp. 1-5.] It may be seen from the record in this case, that after conviction, appellant was sentenced to fifteen years for the same count that Mr. Sabbath was sentenced to five years on. It also might be judicially noticed by this Honorable Court that it has been the practice in some cases for the trial courts of the Southern District of California, Central Division,

where a man has been convicted of more than one count in a narcotics charge, to run the sentences consecutively. We do not say that this is done in every case, but the fear of this is a great persuader, and could lead to Mr. Sabbath being very, very cooperative with Federal Agents in order that he might be allowed to have one count of the indictment against him dropped. This fact, coupled with the fact that Mr. Sabbath had previously been convicted of a felony, leaves his testimony to be thought of in a most unfavorable light.

A commentary on the effectiveness of Mr. Sabbath's testimony, as bolstered by Miss Barnett's testimony, may be found in studying the background of this case. The records show that appellant has been twice tried for this crime. His first trial led to a conviction by a jury, which conviction was set aside and a new trial granted by the trial judge. [R. T. p. 238, lines 19-22.] At the first trial, Miss Barnett did not testify [R. T. p. 202, lines 22-23], and therefore, the only corroboration of Agent Richards testimony, in fact the only evidence that connected appellant with the sale of the narcotics was that of the accomplice Sabbath. It seems clear that the learned trial judge in the first trial did not believe the accomplice Sabbath, or at least he did not feel that being an accomplice, his testimony was so worthy of belief as to convince the Judge that appellant was guilty beyond a reasonable doubt. [R. T. p. 238, lines 19-23.] However, on the retrial, the Government, recognizing this basic flaw in their proof, attempted to corroborate Mr. Sabbath's testimony with that of a convicted perjurer. The above analysis of the testimony of Miss Barnett shows that it is quite obvious she lied in her testimony, and, therefore, we are again faced with the proposition that

appellant had been convicted solely on the testimony of Mr. Sabbath. Yet this proof was not sufficient for the trial judge in the first trial, and should not be sufficient to sustain a conviction under any circumstances. Admittedly, the law is such that on appeal the conviction of appellant would not be reversed solely because the only incriminating testimony was that of an accomplice. However, in this case, there was no jury instruction sufficiently clear to apprise the Jury of the fact that an accomplice's testimony must be viewed with extreme caution and, of course, in this case, the facts are aggravated because of Miss Barnett's testimony, and the fact that there was no specific instruction relative to the attitude the Jury must take toward the testimony of a convicted perjurer. While the Judge made the conventional and usual instructions as to the weight that the Jury should give to the testimony of the witnesses, it is submitted that in the case at bar the facts are such that it was highly prejudicial to appellant for the Judge not to deliver more detailed instructions on the weight to be given testimony of one, an accomplice, and two, a convicted perjurer.

Appellant admits that trial counsel made no request for an instruction as to the close scrutiny to be given the testimony of an accomplice. And appellant admits that the failure to so instruct should be objected to as required under Rule 30, Federal Rules of Criminal Procedure. However, appellant contends that under Rule 52b, Federal Rules of Criminal Procedure, this honorable Court may notice the plain error committed by the trial court in neglecting to instruct on the testimony of accomplices and perjurers as it affected appellant's substantial rights. Rule 52b states, "plain errors or defects

affecting substantial rights may be noted although they were not brought to the attention of the Court.”

As stated in the notes of the advisory committee on rules, Rule 52b is merely a restatement of existing law. (18 U. S. C. 2555; *Wieborg v. United States*, 163 U. S. 632, 658, 16 S. Ct. 1127.)

The application of Rule 52b is clearly brought out in the case of *United States v. Levi* (7 Cir.), 177 F. 2d 827. This case was one where the defendant was convicted on a charge of conspiracy to steal government property. He appealed and his case was reversed, the basis for the reversal being the failure of the trial judge to instruct as to the close scrutiny to be given the testimony of an accomplice.

In *Levi* the Court said:

“Defendants here complain that although the Court gave the jury a cautionary instruction as to the creditability of defendants personal testimony, he gave no instruction as to the close scrutiny to be given the testimony of an accomplice. Such an instruction should have been given, but defendant’s counsel made no request for such instruction, and entered no objection or exception at the conclusion of the judge’s charge by reason of the failure to so instruct. Such objection is required under Rule 30, Federal Rules of Criminal Procedure. The omission to so instruct might have been an oversight, and had the trial judge’s attention been called to it by the objection prescribed in Rule 30, it is likely that an instruction on this subject would have been given. However, as this Court stated in *United States v. Perplies*, 165 F. 2d 874, we may follow *United States v. Atkinson*, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555, and in the public interest notice errors to which

no exception has been taken, even though the 'exceptional circumstances' mentioned in the Atkinson case *supra*, 297 U. S. at page 160, 56 S. Ct. 391, are not present." (At p. 831.)

Then the Court in *Levi* summarized the evidence against the defendant and after the summary said:

"Certainly it cannot be said that evidence of the defendants guilt is 'overwhelming.' Although some suspicious circumstances were proved, sufficient evidence to prove guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice, Ward. The jury was not warned of the frailty of such evidence." (At p. 831.)

It is submitted that the case at bar falls squarely within the rule of *United States v. Levi*. There is no question that although the testimony of Agent Richards created some "suspicious circumstances" sufficient evidence to prove guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice Sabbath and the perjurer Barnett. This being the case it seems obvious that the failure to object as required by Rule 30 should not preclude appellant from raising these points in this Court. Rule 52b should be applied to this case as it was to *Levi*.

This Honorable Court in the case of *Morris v. United States* (9 Cir.), 156 F. 2d 525, aptly stated the proper rule to be applied in cases of this type:

"It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant. No assignment of error was made at the trial governing this claimed error, but we consider it because, as is well

stated in *Suhay v. United States*, 10 Cir., 95 F. 2d 890, 893, ‘ . . . where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form.’ In a criminal case, it is always the duty of the Court to instruct on all essential questions of law, whether requested or not.” (At p. 527.)

The reasoning behind the theory that the testimony of an accomplice must be scrutinized with extreme care was well stated in *Freed v. United States* (C. A. D. C., 1920), 266 Fed. 1012. The Appellate Court reversed a conviction under the Mann Act where the Trial Court refused to give an instruction that the testimony of the accomplices should not be taken as that of ordinary witnesses, but “ought to be received with suspicion, and with the very greatest care and caution.” This instruction was refused by the trial court and the trial court gave only the conventional instruction as to the credibility of witnesses.

In support of their reversal the Court in *Freed* gave the following reasons:

“Not only were these witnesses [the witnesses for the prosecution] accomplices as to one another, but under the evidence they might have been found guilty of conspiracy . . . The testimony of the two male members of the party was even more tainted, for unquestionably under that testimony their conduct was as culpable as that of the defendant. The fact that they so freely implicated themselves in testifying against this defendant is significant, especially as it does not appear that either has been prosecuted. The situation confronting the trial court, therefore, was unusual. There was no direct evidence that was untainted. While it is not improbable that the same

result would have been reached, had the Court cautioned and advised the jury as to the danger of convicting upon the uncorroborated testimony of accomplices, it is not for us to speculate upon this question and resolve it against the accused. The charge of the Court fell far short, in our view, of the requirements of the situation. It amounted to nothing more than the general admonition, which it is proper for the Court to give in all cases.

“The question which the defendant sought to have brought to the attention of the jury, presenting a material, if not vital, issue in the case, was not even mentioned. Had the judge defined an accomplice, and brought sharply to the attention of the jury the character of the governments testimony against the defendant, it cannot be doubted that his counsel would have been in a better position to present his case to the jury, and who may say that the point of view of the jury might not have been different. . . . When we come to consider that in many jurisdictions it is a positive rule of law that no conviction may be had upon the uncorroborated testimony of an accomplice, the importance of the rule in this and other jurisdictions, requiring caution and advice in this connection, is apparent. The jury may convict without corroborating evidence, but in a case like the present the accused is entitled to have the Court first caution and advise the jury.” (At p. 1016.)

Then the Court in the *Freed* case concluded on page 1017 of the opinion:

“Believing that the defendant was not accorded the fair and impartial trial to which he was entitled, and that his interests may have been substantially affected, we are constrained to reverse the judgment and award a new trial. Surely, if it was the duty

of the trial court to caution and advise the jury in the respects pointed out, and we are certain that it was, nothing short of a reversal of the judgment will save the defendant from the harm that may have resulted from the want of such caution and advice.”

Not only is it serious error for a trial court to fail to instruct on the caution and care with which an accomplice’s testimony must be received and that such error may be noticed on appeal even though it had not been objected to in the trial court, some courts require an even stricter instruction when there is testimony in the record by a convicted perjurer.

Where there is testimony of a convicted perjurer in the record, the Court *must* (emphasis added) charge that the testimony of such a witness must be scrutinized with care.

United States v. Katz (D. C., M. D. Tenn.), 78 Fed. Supp. 435, 438;

United States v. Margolis (3d Cir.), 138 F. 2d 1002, 1004;

United States v. Segelman (D. C., W. D. Tenn.), 83 Fed. Supp. 890.

In view of the above cited cases, and the fact that the only evidence in the case at bar, that directly connects appellant with the sale of narcotics was that of an admitted accomplice and a convicted perjurer, it is respectfully submitted that the trial court should have, on its own motion, instructed the jury as the caution and care with which it must scrutinize the testimony of an accomplice and a convicted perjurer.

Further, the above cited cases hold that the Court may notice the error of the trial court even though no objection was made to the instructions at the time they were given.

It has been held, in a case where no exception was taken to the charge to the jury and no error was assigned on appeal, the Court may still not be precluded from considering the unassigned error. The harshness of the sentence itself is justification for doing so.

United States v. Trypuc (2d Cir.), 136 F. 2d 900, 902;

Amendola v. United States (2d Cir.), 17 F. 2d 529, 530.

It seems evident that the case at bar comes squarely within the rule of Rule 52b, Federal Rules of Criminal Procedure, in that there was plain error affecting substantial rights of the defendant and said error may be noticed on appeal although it was not brought to the attention of the trial court.

II.

The Court's Failure to Allow Appellant to Testify to the Business Transactions Between Himself and the Father of the Main Witness for the Government, Frank Sabbath, Was Reversible Error Where Such Testimony Would Show That Appellant Had a Valid Reason for Being on the Premises Where the Narcotics Sale Took Place and Would Show Further Reasons for the Bias of Mr. Sabbath Against Appellant.

When the defendant took the stand, counsel tried to show a relationship between the defendant and Mr. Powell, said person being the father of the accomplice Sabbath [R. T. p. 43, lines 6-24], and also being the person who told Agent Richards that narcotics were being sold at the hotel. [R. T. p. 44, lines 3-14.] Since appellant's defense to the charge was simply that he did not participate in the sale of the narcotics nor did he know about

the sale of the narcotics it seems clearly relevant for him to attempt to explain his presence on the premises when the narcotics were sold. And this explanation should not be confined to a mere statement that he arrived there with Mr. Powell but should also include the transactions with Mr. Powell that had occurred previously on the morning of the sale and the general business relationship between the defendant and Mr. Powell. The Court would not allow any testimony as to the business transactions between the defendant and Mr. Powell. Yet this would clearly be relevant in showing the motive of Mr. Powell informing the police that the defendant was selling narcotics from the premises and also the motive for Mr. Sabbath to deliberately falsify his testimony so as to protect his father. The Court said, "Well, I think the business transaction and other areas of conduct than those of the subject matter of litigation are immaterial." [R. T. p. 149, lines 21-23.] Later Mr. Ridley proposed the following question. "Prior to the time you got to the hotel, had you and Mr. Powell been in a fight or in an argument." To this question plaintiff interposed an objection on the grounds that the question was immaterial and that the motive of the informant were immaterial. The Court sustained the objection saying among other things, "Whether it was done because someone was mad at the defendant or because someone was moved by civic virtue, or what not, does not make any difference." [R. T. p. 151; p. 152, lines 19-21.]

The proposed line of questioning to show that the defendant and Mr. Powell were engaged in business transactions and had some sort of an economic falling out are relevant because they show two things: One, that the defendant had a legitimate reason to be on the prem-

ises, that is, to conduct business with Mr. Powell and two, that because of these economic differences Mr. Powell and Mr. Sabbath might have reason to attempt to get the defendant in trouble.

In *State v. Mayberry* (Mo.), 272 S. W. 2d 236, defendant was accused of first degree murder of his wife's alleged paramour. At the time of the murder the decedent was living in the same house as the wife. The State sought to introduce evidence that the decedent had reasons for being in the house other than his relationship with defendant's wife. Over defendant's objection that, "that wouldn't make one bit of difference" the Court permitted a showing that decedent was paying board. Held, the evidence was competent as explaining deceased presence in the home on a theory other than his relationship with defendant's wife.

The general rule as to admissibility of evidence would seem to be that all facts having rational probative value are admissible in evidence, unless some specific rule forbids.

People v. Jones, 42 Cal. 2d 219, 266 P. 2d 38;

United States v. Grayson (2 Cir.), 166 F. 2d 863.

Evidence which might have considerable weight if defendants theory and testimony are believed by the jury should not be excluded.

People v. Brophy, 122 Cal. App. 2d 638, 265 P. 2d 593.

The modern tendency is to admit any evidence which may tend to illustrate or throw any light on transactions in controversy or be given any weight in determining

issue, leaving strength of such tendency or amount of such weight to be determined by the jury.

People v. Wilder, 135 Cal. App. 2d 742, 287 P. 2d 854;

Garner v. State, 83 Ga. App. 178, 63 S. E. 2d 225.

Generally, it is always relevant, where any act is shown or conduct charged against accused, for him to explain such act or conduct by showing some other hypothesis equally or more natural, as a reason for his conduct and such explanation should always be received.

Commonwealth v. Parshall, 139 Pa. Super. 161, 11 A. 2d 506.

Another purpose for which the testimony concerning business relations between Mr. Powell and the defendant was admissible was to show the bias of the witness Sabbath. The testimony shows that Sabbath was the son of Mr. Powell; that Mr. Powell was the one who accused Mims to Agent Richards as being a seller of narcotics; and that Sabbath, when he was arrested, told the police that he received the narcotics from his father. If appellant had been permitted to show that he had business dealings with Mr. Powell and that they had a falling out concerning these business dealings and that the son Frank Sabbath knew about this falling out prior to the time he testified in the case, then there arises an inference, which the jury might draw, that the conviction of appellant would be a financial gain to Mr. Powell and conceivably to his son, Frank Sabbath. And the conviction would nullify the damning accusation of father by son. Of course, the test is not whether the jury would have drawn these inferences but whether the jury might have drawn these inferences had the evidence been presented. It needs no citation of authority to support the proposition that

one of the greatest influences upon a man's testimony at a trial is his pecuniary interest in the outcome.

The case of *Furlong v. United States* (8 Cir.), 10 F. 2d 492, states the rule in the Federal Court as to impeachment of witnesses for bias. In the *Furlong* case the defendant attempted to cross-examine the government agents as to whether they entertained unfriendly feelings toward him. This line of examination was objected to by the government, and the objection was sustained. The Court said:

“This was clearly error. No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross-examination. His answers are not relevant to the issue but they do throw a direct light on the creditability of his evidence. It is elementary doctrine that hatred, interest and ill-will are among the most potent forces in coloring testimony. Wigmore on Evidence, sections 945, 948, 950.” (At p. 494.)

However the above action by the trial court in the *Furlong* case was not considered prejudicial for the simple reason that on direct examination the defendants were permitted to show the bias, prejudice, and ill-will of the two government witnesses, fully, giving all the details of the previous trouble between defendant and those witnesses. The action of the Court in the *Furlong* case was directly contrary to the action of the Court in the case at bar. In the case at bar, the defendant was not permitted to fully show all the details of the previous relations between himself and Mr. Sabbath and Mr. Sabbath's father, and of course, the bias that might be inferred from those relations. It is submitted that the *Furlong* case demonstrates the correct rule in the Federal Courts

and therefore the trial court in the case at bar was in error.

Certainly evidence is admissible by the defense to impeach the testimony of the plaintiff's witnesses. This testimony can be impeached by showing that the plaintiffs were biased against the defendant and said bias can be shown in many ways, one of which is to show that the plaintiff witness was attempting to avenge a wrong, whether real or imaginary, to his father. On this ground alone the evidence as to the prior transactions between Mr. Powell and the defendant should have been admitted.

See:

70 Corpus Juris 947, *et seq.*

Conclusion.

Certainly it cannot be said that the evidence of the defendants guilt is overwhelming. Although some suspicious circumstances were proved, sufficient evidence to prove his guilt beyond a reasonable doubt was entirely lacking without the testimony of the accomplice, Sabbath and the convicted perjurer, Barnett. The jury was not warned of the frailty of such evidence.

These circumstances, plus the fact that evidence to explain appellants presence on the premises where the narcotics sale took place was excluded, leads to the conclusion that the fair and impartial trial to which appellant was entitled was denied to him.

Wherefore, appellant prays this Honorable Court reverse the judgment below and grant appellant a new trial.

Respectfully submitted,

MINSKY & GARBER,

By ROBERT BARNETT,

Attorneys for Appellant.

No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT, JAMES MIMS.

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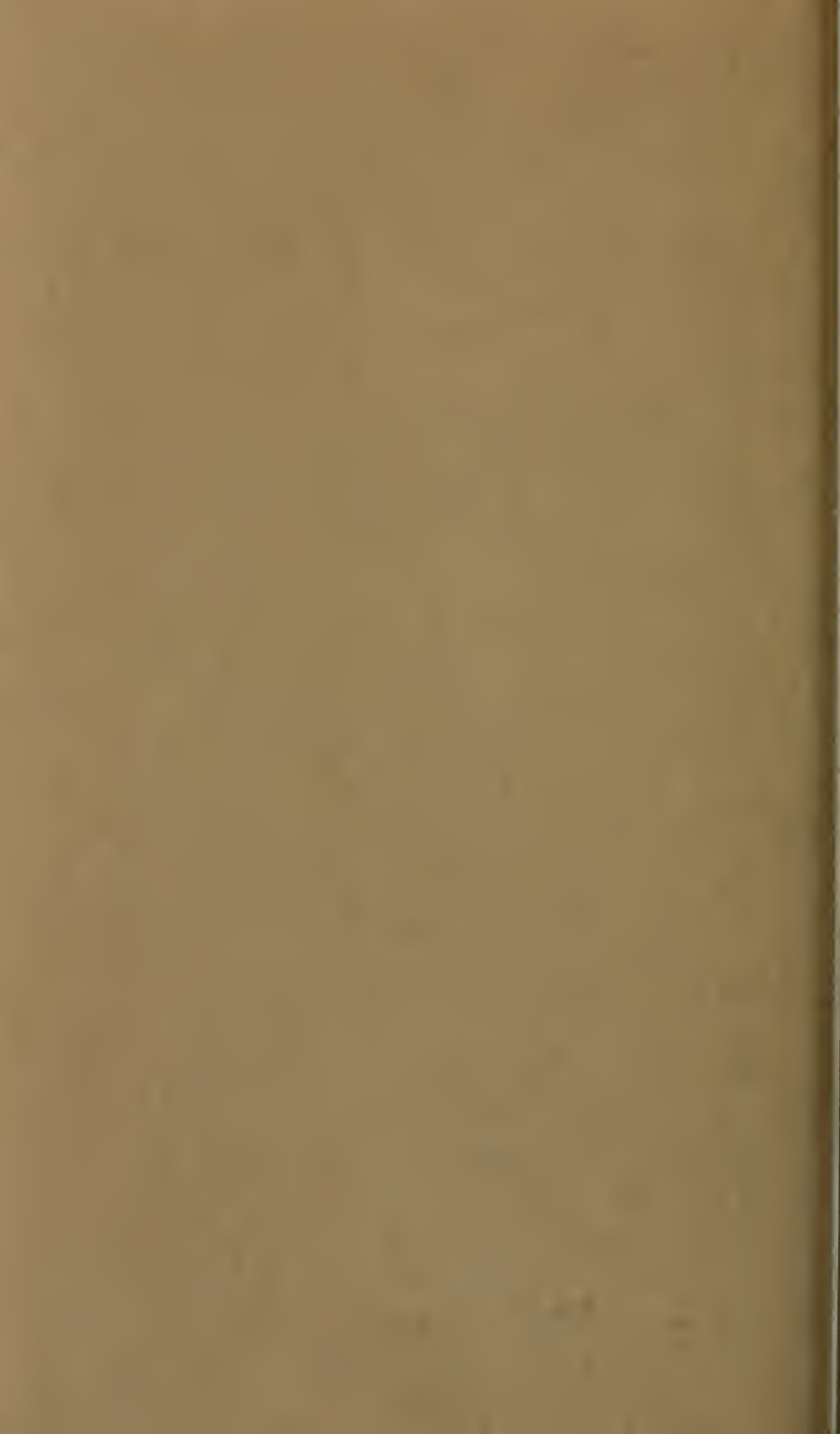
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Appellee.

REPLY BRIEF OF APPELLANT, JAMES MIMS.

The Government's first argument (Appellee's Br. p. 3) is directed to the proposition that appellant is asking this Court to rewiegh the evidence below and in essence to find the facts differently. Appellant has no quarrel with the Government's proposition that an appellate court should view the evidence in a light most favorable to the Government and grant every intendment in favor of the verdict of the jury. However, it appears that the Government has misconceived the thrust of appellant's argument.

Appellant admits that the testimony of Sabbath and Barnett was sufficient to sustain the conviction of appellant and because of that very fact, appellant contends that the trial court committed prejudicial error in refusing to give an instruction on the close scrutiny that must be used by the jury in evaluating the testimony of an accomplice and a convicted perjurer.

Appellant does not ask this Court to resolve the conflict of evidence, between the Government's case and the defendant's case, in favor of the defendant. Rather, appel-

lant wishes this Court to reverse the conviction below because the conflict of the Government witnesses, *inter se*, on the most important points in question, to-wit: whether they actually saw appellant involved in an alleged sale of narcotics, made it imperative that the trial judge instruct the jury on the close scrutiny to be given testimony from this type witness.

On page 7 of appellee's brief, the Government attempts to distinguish one of appellant's strongest cases, that of *United States v. Levi*, 177 F. 2d 827 (7th Cir., 1949) on the ground that the actual reversal was based on an improper question about a prior conviction asked by the United States Attorney. Appellant cannot agree with this distinction in view of the strong language used in the Court's opinion 177 F. 2d at page 831, cited in appellant's opening brief on page 21. Appellant has the impression that if the case at bar were one in which reversal was requested on the ground that an improper question about a prior conviction was asked, and cited *Levi* in support thereof, Government counsel would distinguish the *Levi* case on the ground that the actual point that decided the case was the lack of an adequate jury instruction on the scrutiny with which an accomplice's testimony must be viewed.

On page 8 of appellee's brief, Government counsel makes a statement which cannot go unanswered. Government counsel states:

"The fact that the jury was informed of Miss Barnett's prior perjury conviction (C. T. p. 136, lines 19-23) almost precludes the possibility of any prejudice resulting from her testimony *according to authority which has received the Supreme Court's stamp of approval*. Hilliard v. U. S., 121 F. 2d 992 (4th Cir., 1941) cert. den. 314 U. S. 627."

It can never be stated frequently enough that denial of certiorari by the United States Supreme Court can never imply approval of the decision for which review is sought or of its supporting opinion. As Mr. Justice Frankfurter has stated as recently as December 9, 1957:

“Although the Court has definitely decided that the denial of a petition for certiorari carries no legal significance, *Brown v. Allen*, 344 U. S. 443, 489-497; 97 L. Ed. 469, 489-510; 73 S. Ct. 397, both in briefs and lower courts in their opinions continue to note such denials by way of reconsidering the authority of cited lower court decisions. It has therefore seemed to be appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of a decision for which review is sought or of its stated opinion.” . . .
Elgin J & E Ry. v. Clarion Vern Gibson, 355 U. S. —, 2 L. Ed. 2d 193 (1957).

And in final reply to Government's brief, appellant strongly controverts the statement made on page 10 thereof that “the facts are clear that Mims was observed by Agent Richards taking an active part in the sale of a half ounce of heroin” [R. T. p. 28, line 7, to p. 30, line 12].

A reading of the cited testimony will show that in fact Agent Richards did not see Mims taking an active part in the sale of the half ounce of heroin. All that testimony will show is that Agent Richards saw Mims and Sabbath in conversation. On cross-examination, it is clearly brought out that Agent Richards heard none of the conversations between Mims and Sabbath and saw no package passing between Sabbath and Mims.

The testimony in the reporter's transcript from page 55, line 25, to page 56, line 12, shows exactly what Agent Richards saw and heard; that testimony is as follows:

“Q. While Sabbath was up there at the end of the hall, did you see or could you hear what they were talking about? A. I couldn’t . . .

Q. Their backs were to you, is that true? A. All I saw were the two men down there. I don’t know just whether they were facing me or not.

Q. You don’t know what was going on? A. No.

Q. What the conversation was about? A. No, sir.

Q. Did you at any time see Mr. Mims give to Mr. Sabbath any package? A. No, sir.”

From the above testimony, it can be seen that the only acts that Agent Richards could testify to concerning the appellant Mims were what seemed to be innocuous acts and it is submitted were innocuous acts. The testimony that makes these innocuous acts turn criminal is that of the accomplice Sabbath. (Miss Barnett’s testimony being completely false). He is the one who said that this so-called conversation in the hall concerned a narcotics transaction. He is the one who has much at stake in the outcome of this trial. Sabbath and Barnett’s testimony should have been scrutinized by the jury with extreme care. And it is because of their testimony the Court was required to give a cautionary instruction, and its failure to do so, it is submitted, was reversible error.

Wherefore, appellant prays that this Honorable Court reverse the judgment below and grant appellant a new trial.

Respectfully submitted,

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No. 15654

IN THE

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JAMES MIMS,

Appellant,

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Appellee.

APPELLEE'S BRIEF.

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No. 15654

IN THE

United States Court of Appeals
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JAMES MIMS,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Jurisdiction of this Honorable Court on appeal is conferred by virtue of the provisions of Title 28, United States Code, Section 1291 and Section 1294.

II.

STATEMENT OF THE CASE.

The events leading to Mims' arrest begin on September 14, 1956, when Reverend Powell informed Federal Narcotics Agent Malcolm Richards that Mims was selling narcotics at 1114 E. 10th Street. [R. T. p. 21, lines 8-14; p. 22, lines 16-18.] Richards called a telephone number given him by Powell. A female voice answered, and at Richards' request, the woman turned the phone over to a man, who said, "I am Mims." [R. T., p. 21, lines 11-17.] As a matter of fact, it *was* Mr. Mims who spoke to Richards after Miss Barnett had answered the phone. [R. T. p. 133, lines 6-14.] Mims and Richards then arranged a sale of narcotics at 1114 E. 10th Street. [R. T. p. 21, line 18, to p. 22, line 15.] Richards drove

to that address with three other officers at 3:00 p.m. the same day and observed Mims looking out of the window as he (Richards) was entering the building. [R. T. p. 22, line 16, to p. 23, line 4.] After Agent Richards entered the building, he identified himself as "Deacon Allen" [R. T. p. 27, lines 8-9], but Mims said that he was not Mims, but that "Mims would be here in a few minutes." [R. T. p. 27, lines 10-11.] Shortly thereafter, Frank Sabbath arrived [R. T. p. 28, lines 10-11] and Mims and Sabbath engaged in conversation in the hallway. [R. T. p. 28, lines 7-9.] Sabbath was apparently supposed to be masquerading as Mims when he walked over to speak to Richards. After Richards asked Sabbath how much stuff \$150 would buy, the latter returned to Mims and asked the same question. [R. T. p. 110, lines 12-22.] Mims told Sabbath it would buy a half-ounce. [R. T. p. 110, lines 23-24.] Then Mims gave Sabbath the half-ounce of heroin [R. T. p. 111, lines 22-23], after which Sabbath and Richards went into another room where the sale was consummated. [R. T. p. 30, lines 11-25.] While they were still in the room, it was made more apparent that Sabbath was "fronting" for Mims when Bonnie Barnett knocked at the door and said "Frank, I want to see you." When Agent Richards said that he thought his name was Mims, Sabbath informed Richards that people called him Mims sometimes. [R. T. p. 31, line 24, to p. 32, line 5.] It should also be noted that Miss Barnett also saw Mims hand the package to Sabbath. [R. T. p. 134, lines 20-22.] Frank Sabbath completed his errand by turning the \$150 over to Mims, who gave him \$10 for his services. [R. T. p. 113, lines 11-22.] Agent Richards had already left the premises when Sabbath gave Mims the money. On February 28, 1957, a verdict of guilty was returned against James Howard Mims.

III.
ARGUMENT.

A.

On an Appeal From a Conviction the Appellate Court Should View the Evidence in a Light Most Favorable to the Government and Grant Every Intendment in Favor of the Verdict of the Jury.

In arguing that the evidence as presented in the trial court was insufficient to sustain the conviction without the testimony of Frank Sabbath and Bonnie Barnett, the appellant alluded many times to the inconsistencies and contradictions in the testimony, particularly that of Miss Barnett. It is invariably held in the Federal Courts that upon appeal from a conviction, the evidence and all inferences which may reasonably be drawn therefrom are to be viewed in the light most favorable to the government.

United States v. Glasser, 315 U. S. 60, 80;

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953) *cert. den.*, 347 U. S. 937;

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), *cert. den.*, 350 U. S. 954.

If the rule were otherwise, the appellate court would be usurping one of the functions of the jury, namely, that of trying the facts. In light of this well established canon of review, the impropriety of *appellant's* weighing of the evidence and credibility of witnesses is apparent. As the court succinctly stated in *Dean v. United States*, 246 F. 2d 335, 337 (8th Cir., 1957):

“ . . . The jury having returned verdicts of guilty, we must assume that all conflicts in the evi-

dence were resolved in favor of the government and, as we have often said, the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven and if, when so considered, reasonable minds might reach conclusions the issue is one of fact to be submitted to the jury and not one of law to be determined by the court."

Merely because there were conflicts in the testimony of the witnesses vis-a-vis one another cannot sustain appellant's conclusions that the evidence is insufficient or that the testimony of Miss Barnett or the other witnesses is "clearly false." Appellant does not really know whose testimony was false. *All appellant can possibly be sure of is that the conflicts were resolved against him.* This is hardly sufficient reason to single out Miss Barnett, or any other witness as a liar. Needless to say, it is hardly proper to consider the evidence in a light most *unfavorable* to the Government when the rule in the Federal Courts is exactly the opposite.

It is therefore respectfully submitted that the evidence should be viewed in the light most favorable to the Government. *United States v. Glasser, supra; Schino v. United States, supra; Arena v. United States, supra; United States v. Brown, supra.* And it is further submitted that the statement of facts included herein properly presents the evidence.

B.

In the Absence of a Request for an Instruction That Testimony of an Accomplice and a Convicted Perjurer Should Be Received With Caution, the Court's Failure to Give Such an Instruction on Its Own Motion Is Not Reversible Error. This Is Especially True Where No Objection, Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, Is Made to the Instructions as Given.

One of the most basic of rules in the Federal Courts is that whenever *any specific* instruction is desired by a defendant, such defendant must request the instructions of the trial court. It follows that error may not be predicated on the trial judge's failure to then give the instruction on his own motion.

Goldsby v. United States, 160 U. S. 70, 77;

Zamloch v. United States, 193 F. 2d 889 (9th Cir., 1952);

Himmelfarb v. United States, 175 F. 2d 924, 944 (9th Cir., 1948), *cert. den.*, 338 U. S. 860;

Obery v. United States, 217 F. 2d 860 (D. C. Cir., 1954).

This rule is especially clear in the Federal Courts with respect to the effect to be given the testimony of an accomplice. While it is considered better practice to give an instruction against placing too much reliance upon the testimony of an accomplice, still the failure to give such an instruction is not error.

United States v. Caminetti, 242 U. S. 470, 495;

United States v. Capitol Meats, 166 F. 2d 537, 539 (2d Cir., 1940), *cert. den.*, 334 U. S. 812.

This rule was recently reaffirmed in this circuit in *Papadakis v. United States*, 208 F. 2d 945, 954 (9th Cir., 1953). In other words, the responsibility of framing adequate instructions is not borne by the trial judge alone, but is shared by the trial attorney. In speaking of Rule 30 of the Federal Rules of Criminal Procedure. This Honorable Court admonished attorneys that:

“ . . . (p)ainstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of criminal justice.” *Enriquez v. United States*, 188 F. 2d 313, 316 (9th Cir., 1950).

In the instant case, appellant did not avail himself of Rule 30 by requesting an instruction concerning the scrutiny to be given the testimony of an accomplice, or by objecting to the instructions as given, *even when the trial judge asked if counsel had any further suggestions or objections*. [R. T. p. 220, lines 17-22.]

It should also be noted that because of the striking facts of this trial, the chances of prejudice resulting from Frank Sabbath's testimony are remote, if not non-existent. It was clearly brought out during the cross-examination of Sabbath that he originally told the authorities and appellant's counsel that his father, Reverend Powell, had given him the narcotics. [R. T. p. 123, lines 7-18.] In other words, the fact that Sabbath *changed* his story to implicate Mims was clearly before the jury when they evaluated his testimony. The fact that he was also an accomplice of Mims' was also before the jury. It is reasonable to assume that *under such circumstances, the jury put the testimony of Frank Sabbath to the sternest and most rigorous of tests*. The issue then was one of credibility, and in spite of Sabbath's changes in his story, the jury chose to be-

lieve his story in conjunction with those of the other government witnesses, and chose not to believe Mims. It needs no repeated citation of authority to state that credibility and weight to be given evidence were questions for the trier of fact.

Upon close reading, the authorities cited by appellant do not appear to sustain his position, either. In *United States v. Levi*, 177 F. 2d 827 (7th Cir., 1949), the actual ground of reversal was an improper question about a prior conviction asked by the United States Attorney. *Morris v. United States*, 156 F. 2d 525 (9th Cir., 1946) was reversed because of the trial judge's failure to instruct the jury as to the nature of the offense and the statutes involved therein. Needless to state, a *general* instruction *on the law* involved in a criminal case is far different from a desired *specific* instruction on the *credibility* of accomplices. In the latter instance, a request must be made of the trial court. *Papadakis v. United States*, *supra*.

Freed v. United States, 266 Fed. 1012 (D. C. Cir., 1920), upon which appellant relies heavily, involved the trial judge's *refusal* to give an instruction on the testimony of accomplices. It needs little discussion to point out that *Freed* is an entirely different case from the instant case—the *refusal* to give this particular *requested instruction* cannot be equated with the failure of a judge to give a specific instruction on his own motion without a request. The former may be reversible error, but the latter never is. *United States v. Caminetti*, *supra*; *United States v. Capitol Meats*, *supra*; *Papadakis v. United States*, *supra*.

Regardless of appellant's citation of cases from the Third Circuit, it is submitted that the same rule be applied to the failure of appellant to request an instruction with respect to Miss Barnett's testimony and the court's sub-

sequent failure to give such instruction. The *general rule that any desired specific instruction must be requested*, *Goldsby v. United States*, *supra*; *Obery v. United States*, *supra*; *Zamloch v. United States*, *supra*, has not been deviated from in any circuit other than the Third Circuit. As such, it would appear to be an aberration peculiar to that Circuit alone. A close scrutiny of appellant's cases also leaves some considerable doubt as to whether even that circuit has really departed as completely from the general rule as appellant seems to contend. For example, in *United States v. Segelman*, 83 Fed. Supp. 890 (W. D. Pa., 1949), the defense was not allowed to question a government witness about a conviction for perjury upon which a motion for a new trial was then pending. The court merely said that the defense should have been allowed to develop that fact, regardless of the pending motion. In *United States v. Margolis*, 138 F. 2d 1002 (3d Cir., 1943), the reversal of one count went off on a different ground, namely, that "the expression of an opinion which is irrelevant cannot be the subject of perjury." (138 F. 2d 1002, 1005.) The conviction for perjury was accordingly reversed.

Regardless, however, of the vitality or validity of the "Third Circuit Rule," the fact that the jury was informed of Miss Barnett's prior perjury conviction [R. T. p. 136, lines 19-23] almost precludes the possibility of any prejudice resulting from her testimony, according to authority which has received the Supreme Court's stamp of approval: *Hilliard v. United States*, 121 F. 2d 992 (4th Cir., 1941), *cert den.*, 314 U. S. 627. In *Hilliard* the court in considering much the same problem as presented herein, said at page 1000:

"The defendant complains that the jury was not expressly told that they should scrutinize the testi-

mony of Stella Vaughan with care and caution. It would have been well to have given an instruction in these very words; *but there was no prejudicial error, for the bearing of the witness' manner of life on her credibility was specifically called to the jury's attention, so that they were not without warning in this respect . . .*" (Emphasis added.)

In the instant case it is reasonable to assume that *the jury, after being informed of Miss Barnett's prior perjury conviction, considered her testimony with great care.* Once again, the issue narrows to one of credibility, the determination of which was for the jury.

It should also be noted that the judge's instructions as to the credibility to be given witnesses were quite adequate to cover both Sabbath and Miss Barnett, though he used Sabbath as an example. [R. T. p. 215, line 25, to p. 218, lines 25; also reproduced on pages 9 to 11 of Appellant's Brief.] In particular the following passage should be noted:

"It might be impeached simply by reason of the base character of the witness who testifies. As reasonable men and women of adult years you will realize that there are people in life who are of such a character that you wouldn't accept their testimony just because of the kind of a person they are." [R. T. p. 216, lines 11-16.]

In light of the above quoted authorities and the information presented to the jury concerning the past reputations and actions of Mr. Sabbath and Miss Barnett, it is respectfully submitted that the trial court committed no error by its failure to give specific instructions relative to the credibility of these two witnesses, when appellant did not re-

quest such instructions. Nor is there anything in the record before this Honorable Court on appeal which could constitute "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

C.

No Reversible Error Was Committed by the Trial Court in Excluding Appellant's Testimony Concerning Business Transactions Between Himself and Reverend Powell, Which Testimony the Trial Court Considered Irrelevant. Even If Any Error Was Committed, It Was Harmless.

In light of the government witnesses' testimony which positively placed Appellant Mims at the center of the narcotics transactions of September 14, 1956, it is difficult to see what possible relevance the *motives* of Reverend Powell, the informer, had to the issues in this case. Regardless of whether Reverend Powell informed because of a sense of righteousness, or out of spite, the facts are clear that Mims was observed by Agent Richards taking an active part in the sale of a half-ounce of heroin. [R. T. p. 28, line 7, to p. 30, line 12.] Richard's testimony was complemented and corroborated by Frank Sabbath [R. T. pp. 105-114] and Bonnie Barnett. [R. T. pp. 131-137.] In other words, whatever motive Powell had in informing is not material because the information he imparted to Agent Richards was not in any way connected with James Mims' activities as a dope peddler. It should also be noted that it is unlikely that Powell had any different or stronger motives in informing against Mims than he had had in informing against others in the past, as Powell was well known to the authorities as an informer and had performed this function many times before. [R. T. p. 43, line 21, to p. 44, line 17.]

It is also difficult to understand how error can be predicated on the exclusion of this testimony when *supposedly* used to show why Mims was on the premises, when *in fact* he was allowed to show why he was there through other testimony. Mims starts his narrative by testifying that he drove to 1114 E. 10th Street with Reverend Powell on September 14, 1956. [R. T. p. 148, lines 1-11.] During the course of direct examination, Mims testified that Powell told him to take a trust deed and get himself a house. This answer was allowed in the record because Mims answered before an objection could be made. [R. T. p. 149, lines 2-14.] After they arrived, Mims testified that he was instructed by Powell to go into the building at 1114 E. 10th Street. [R. T. p. 154, lines 3-4.] Mims then testified that "Deacon Allen" was coming over to meet Powell. (P. 156, lines 5-10.) After "Deacon Allen" (Agent Richards) had arrived, Frank Sabbath came in, and according to Mims, brought a package for "Deacon Allen" from Powell. [R. T. p. 162, line 19, to p. 163, line 6.] At this point Mims alluded to the business difficulties he was allegedly having with Reverend Powell when he testified as follows:

"Mims: I told him I wasn't going to give him a goddam thing; I wants my money.

Mr. Ridley: What did you do at that time?

A. I went out this back door to his house on the other street.

Q. Did you have some reason for going out the back door? A. He had been dodging me, and that's when I was catching up with him.

Q. You had sent Frank to pick the Reverend up, is that right? A. Yes, sir.

Q. The Reverend was supposed to have come down with some money for you? A. That's right.

Q. Then Frank came back alone? A. That's right." [R. T. p. 163, lines 8-23.]

As for showing Mr. Sabbath's bias or motives to falsify his testimony, the fact that he had originally implicated his father and then changed his testimony to implicate Mims was sufficient to demonstrate possible bias to the jury, and inject that possible element in their deliberation.

As a matter of fact, much of the foregoing discussion was only included in Appellee's Brief for the sake of completeness because the actual offer of proof was not made for some of the purposes which appellant alleges in his brief. The *Opening Statement* which appellant cites on page 13 of his brief is *not an offer of proof*. The actual offer of proof was as follows:

"Your Honor, there is a period of time here in which Mr. Mims, according to the testimony of Frank Sabbath, allowed Sabbath to go to Vernon and Central to pick up his father. Now, during that period of time, Mr. Richards claims that certain calls were made and that he had had contact with Reverend Powell that morning. Now, I would like to show if I could, that along the line suggested by the boy's testimony, actually the boy did go to Vernon and Central and get the stuff from Reverend Powell and bring it down here" [R. T. p. 151, lines 3-11.]

Thus, the testimony in fact was never offered to show *bias*. Regardless, therefore, of the exclusion of the testimony relating to *business transactions* between Mims and Powell, appellant was subsequently allowed to show by his own testimony exactly what was in his *offer of proof*, to wit, that Sabbath got the stuff from Powell, and

brought it back to 1114 E. 10th Street. [R. T. p. 162, line 19, to p. 163, line 6; p. 163 lines, 8-23.] Appellant never tried to show bias in his *direct examination* of Mims. *Furlong v. United States*, 10 F. 2d 492 (8th Cir., 1926), upon which appellant relies held that it was error not to allow the defense to show the bias or prejudice of a government witness by *cross-examination*. It is almost too obvious to point out that appellant's counsel was not cross-examining his own client in an effort to show bias. His own offer of proof, *supra*, leaves no doubt of this. It is therefore submitted that the *Furlong* case clearly has no application to the excluded testimony the appellant gave on direct examination.

Conclusion.

1. On an appeal from a conviction the Appellate Court should view the evidence in a light most favorable to the Government and grant every intendment in favor of the verdict of the jury.

2. Questions concerning the credibility of witnesses are not properly open to an appellate court, even when there were conflicts in the testimony.

3. Whenever any specific instruction is desired by the defendant, he must request such instruction of the trial court or must object to the instructions as given, as provided in Rule 30 of Federal Rules of Criminal Procedure.

4. In absence of a request for an instruction concerning the credibility of an accomplice's testimony, the trial court's failure to give such an instruction is not plain error within the meaning of Rule 52(b). This is especially true where the accomplice's testimony was vigorously challenged in the jury's presence.

5. When a witness's prior conviction for perjury is clearly called to the jury's attention, the failure of the trial court, in the absence of a request by the defendant, to give an instruction that the testimony of a convicted perjurer must be received with extreme caution is not plain error within the meaning of Rule 52(b).

6. The trial court did not commit reversible error in excluding the appellant's testimony about business transactions which are unconnected with the issues being tried.

Wherefore, the United States respectfully requests this Honorable Court to affirm the judgment of conviction.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

THE OCEANIC STEAMSHIP COMPANY,
Appellant,
vs.

INDEPENDENT STEVEDORE COMPANY,
a corporation, and PORTLAND STEVE-
DORING COMPANY, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

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FILED



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Appellees.

APPELLANT'S OPENING BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the United States District Court for the District of Oregon, nonsuiting the third party complaint of appellant against appellees following entry of judgment against appellant and in favor of plaintiff in the primary action. The judgment in the primary action is not appealed from.

This Court has appellate jurisdiction under 28 U.S. C.A. 1291.

STATEMENT OF THE CASE

This is a case in which an incredible injustice has been done by denying indemnity to a shipowner, previously held liable to a longshoreman, where the longshoreman was injured solely by reason of a dangerous condition created and then negligently corrected by the third party defendants, although the shipowner had absolutely no active part.

Guy W. Swanson (hereinafter called Swanson), a longshoreman, filed an action in the Circuit Court of the State of Oregon for the County of Multnomah against Matson Navigation Company and The Oceanic Steamship Company (hereinafter called Oceanic), which action was removed to the United States District Court upon the grounds of diversity of citizenship. Thereafter, by order of the Court, Independent Stevedoring Company (hereinafter called Independent) and Portland Stevedoring Company (hereinafter called Portland), were impleaded as third party defendants on a claim for full indemnity in case of recovery by Swanson. Trial was had without a jury before the Honorable Claude H. McCulloch, resulting in entry of judgment in favor of Swanson and against Oceanic in the amount of \$112,053.66 plus costs and disbursements; and the Court also entered judgment in favor of the third party defendants on the claim of Oceanic for indemnity. Matson Navigation Company was not involved after Oceanic filed its answer. Judgment was entered against Oceanic only.

During the pendency of this appeal the principal action was settled by payment of \$90,000.00 and satisfaction of Swanson's judgment against Oceanic was filed and entered.

FACTS

Mr. Swanson was injured while working as a longshoreman aboard the SS VENTURA on the 9th day of February, 1955, at Portland, Oregon.

The ship was a C-2 type vessel owned and operated by Oceanic. It is equipped with steel hatch covers supported on each deck by strongbacks. The hatch covers and strongbacks were provided with the vessel when it was built, in accordance with its original design, except for replacement of individual hatch covers from time to time due to wear and tear and accidental damage. The strongbacks or beams are used to bridge over hatch openings and support the hatch covers. They rest in slots in the port and starboard hatch coamings of each hatch opening, approximately four feet apart, and are formed on the upper side in such a manner as to allow the hatch covers to rest on them at the same level as the deck. The individual hatch covers* are approximately four feet in length, two and one-half feet in width and two inches thick. They are steel, but not solid, having a hollow outer frame and a corrugated or designed surface to increase their rigidity. (Oceanic Exhibit 56—Tr. 228, 229, 230, 231.)

* These are sometimes referred to as "boards," although not made of wood.

Shortly before the 9th of February, 1955, the vessel was partially loaded at Yaquina Bay, Oregon, by employees of Independent (Tr. 260) who replaced the No. 7 strongback on the lower tween deck in the No. 3 hatch in such a manner that it protruded approximately four inches above the level of the deck instead of resting fully in its housing slots (Tr. 261). As a result, the ends of the hatch covers resting on either side of it were raised above the deck when replaced by employees of Independent. They were caused to be tilted upward the same distance that the strongback protruded above its normal position. The openings on the upper decks were closed by Independent and no notice of this condition was given Oceanic by Independent.

Upon cessation of work by Independent's employees the vessel proceeded to Portland, Oregon where No. 3 hatch was opened by employees of Portland for further loading operations.. The vessel was docked at Terminal No. 4 in the City of Portland for this purpose on the 9th of February, 1955, having come directly from Yaquina Bay (Tr. 261). No work was done in No. 3 hatch after the completion of operations by employees of Independent and the hatch had remained closed until employees of Portland commenced work (Tr. 261).

The plaintiff, Swanson, was a member of the long-shore gang assigned to work in No. 3 hatch. He went down to the tween deck with other members of his gang, where they had been directed to stow cargo in the wings. Upon reaching the tween deck the longshoremen, including Swanson, refused to proceed with their work, as they

claimed the deck was unsafe to work upon (Tr. 250). The No. 7 strongback still protruded above the deck level, and the ends of the hatch covers resting on each side of the strongback were tilted upward. It was also claimed that some of the hatch covers were bent, twisted or "dished" (Tr. 250).

A conference was had on the vessel among the members of the longshore gang, the gang boss and the walking boss, all employees of Portland. The walking boss was the chief supervisor and the person having responsibility for directing the stevedoring activities. In the conference held by this group it was decided that a wooden deck would be built over the hatch opening entirely covering the steel hatch covers before loading operations would proceed.

The walking boss left it up to the gang boss and the longshore gang as to whether or not they should switch the No. 7 and No. 1 strongbacks. He left the hold to make arrangements to obtain lumber to "floor" the hatch opening. He went up to the main deck and asked the supercargo, an employee of Oceanic, where he could obtain the lumber and was advised of the location of some lumber. He asked for no assistance from Oceanic to correct the condition. It is clear from the evidence that Oceanic first gained knowledge of the condition of the No. 3 lower tween deck by reason of the inquiry of the walking boss as to the location of lumber. The supercargo, as his title indicates, supervised the work of checking the cargo as to such matters as identification, damage and location.

The supercargo gave no instructions to the employees of Portland to proceed with their work and knew nothing of the changing of the beams until after the accident. After the walking boss left the hatch, the longshore gang, including the gang boss, decided among themselves to remove both the No. 7 and the No. 1 strongbacks and to exchange them. Apparently, they assumed the employees of Independent had confused the two strongbacks and that if their positions were reversed they would fit properly and allow the hatch covers to be level with the rest of the deck.

Without notifying any employee of Oceanic of their intended procedure, and relying upon the authority of their own gang boss, the longshoremen removed two rows of hatch covers at each end of the hatch opening and switched positions of the No. 1 and No. 7 strongbacks. The hatch covers were replaced at the forward end of the hatch by unidentified longshoreman, while Swanson and his partner proceeded to replace the hatch covers at the after end.

Swanson and his partner replaced three hatch covers at the after end of the No. 3 hatch, walking onto the hatch from the starboard side. Then, while they were carrying the next hatch cover to place it in position, Swanson stepped on a hatch cover which they had just put down. Whether that hatch cover had not been placed squarely in position or whether he pushed it when he stepped on it, or whether it slipped for some other reason is unknown and unproved by the evidence. The only known fact is that it moved under his weight and he, the

cover he stepped on and the one he was helping to carry were precipitated into the lower hold. He fell a distance of about seven feet and suffered back and head injuries.

Following the accident all the hatch covers were put in position and the lumber for flooring over the hatch was received and put in place. The men worked on the wooden surface to perform the cargo loading.

The wooden surface could have been put into place without any changing of strongbacks or removal and replacement of hatch covers. The surface would not have been level at the after end, but it would have been perfectly safe. The hatch covers could have been safely covered with lumber even though the hatch covers resting on No. 7 strongback were raised four inches above the deck level. The covered area is so large that a rise of only four inches near the end of the wooden platform would have no effect at all upon the cargo operations.

The Trial Court held that the vessel was unseaworthy, that Oceanic was negligent, and that both the unseaworthiness and negligence were proximate causes of the accident and the resulting injuries to Swanson. The conclusion that Oceanic was liable to Swanson was based upon findings that protrusion of No. 7 strongback above the deck level, which caused the covers resting upon it to be tilted upward, and that the bent, twisted, or dished condition of some of the hatch covers constituted an unseaworthy condition. Oceanic was found to be negligent also because of the same conditions.

There was no proof of any notice to or knowledge of Oceanic of the conditions prevailing at the No. 3 hatch

other than the brief conversation between the walking boss and the supercargo when the walking boss met the supercargo on the main deck and asked for some lumber. The walking boss may have said something to an unidentified ship's officer about the hatch covers, but what he said or when is not known. There is no evidence that a ship's officer urged the longshoremen to work or knew of, much less approved, the manner in which they tried to correct the condition created by Independent.

The employees of Portland, including Swanson and his supervisors, were fully aware of the conditions when they proceeded to correct them. The method which they used was unnecessary and negligently pursued.

The Trial Court held that neither Independent nor Portland was negligent in a manner which contributed to the causing of the accident to Swanson and that neither of them breached its contract to perform its operations in a safe and workmanlike manner. This appeal has been taken from the judgment in favor of Portland and Independent entered upon these findings.

SPECIFICATIONS OF ERROR

1. The Trial Court erred in finding and concluding that the bent, twisted or dished condition of some hatch covers was an unseaworthy condition proximately causing the accident to Swanson.

2. The Trial Court erred in finding and concluding that furnishing or permitting any of the hatch covers to be or remain in a bent, twisted or dished condition was negligence proximately causing the accident to Swanson.

3. The Trial Court erred in finding and concluding that Independent was not negligent and/or that the negligence of Independent was not a proximate cause of the accident to Swanson.

4. The Trial Court erred in finding and concluding that Portland was not negligent and/or that the negligence of Portland was not a proximate cause of the accident to Swanson.

5. The Trial Court erred in failing to find that unseaworthiness of the vessel was a passive condition only and not a proximate cause of the accident to Swanson.

6. The Trial Court erred in failing to find that negligence of Oceanic was passive or only secondary and not an active or a primary cause of the accident to Swanson.

7. The Trial Court erred in failing to find that Independent was a primarily and actively negligent party whose negligence in improperly replacing the No. 7 strongback and the hatch covers resting upon it was a proximate cause of the accident to Swanson.

8. The Trial Court erred in failing to find that Portland was a primarily and actively negligent party whose negligence in permitting its employees to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay, was a proximate cause of the accident to Swanson.

9. The trial Court erred in failing to find that unseaworthiness of the vessel and/or the negligence of Oceanic furnished only a condition to the accident to Swanson

and that neither nor both were proximate causes of such accident.

10. The Trial Court erred in failing to find that Independent was obligated by its contract with Oceanic to perform its operations in a safe and workmanlike manner and that such obligation was breached by Independent by its negligent performance of the work of replacing strongbacks and hatch covers on the tween deck of the No. 3 hatch.

11. The Trial Court erred in failing to find that Independent was obligated by the implied terms of its contract with Oceanic to indemnify Oceanic against loss or harm caused Oceanic by reason of the breach by Independent of its agreement.

12. The Trial Court erred in failing to find that Oceanic was damaged in the amount of \$90,000 plus costs and reasonable attorneys' fees by reason of the breach by Independent of its agreement.

13. The Trial Court erred in failing to find that Portland was obligated by its contract with Oceanic to perform its operation in a safe and workmanlike manner and that such obligation was breached by Portland by its negligent performance of its work in allowing its employees, particularly Swanson, to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay.

14. The Trial Court erred in failing to find that Portland was obligated by the implied terms of its con-

tract with Oceanic to indemnify Oceanic against loss or harm caused Oceanic by reason of the breach by Portland of its agreement.

15. The Trial Court erred in failing to find that Oceanic was damaged in the amount of \$90,000 plus costs and reasonable attorneys' fees by reason of the breach by Portland of its agreement.

16. The Trial Court erred in entering a judgment nonsuiting Oceanic's action against either Independent or Portland, or both of them.

17. The Trial Court erred in failing to enter a judgment in favor of Oceanic allowing full indemnity against Independent or Portland, or both of them.

SUMMARY OF ARGUMENTS

The errors of the Trial Court involve the principles governing the indemnity owed a shipowner by an independent stevedoring contractor in a case where the shipowner has been held liable to an injured employee of the stevedoring company either on a theory of negligence or on a theory of unseaworthiness of a ship. The settled law requires indemnity be paid on either of two theories: (a) by reason of contract or (b) by reason of active negligence of the contractor operating upon a passive condition.

Each of the stevedoring companies in this case contracted to perform its operations in a safe and workmanlike manner and each agreed to indemnify Oceanic for

any loss or damage suffered by it as a result of breach of first obligation. Each stevedoring company breached those obligations.

The Trial Court erred in holding that the unseaworthiness of the ship or the negligence of Oceanic, or both, were the sole proximate causes of the accident to Mr. Swanson and the losses and damages suffered by reason thereof. Its findings on the issue of proximate cause are clearly erroneous, for the evidence is uncontradicted that each of the stevedoring companies was actively negligent, while any default of Oceanic was merely passive, i.e., the furnishing of a condition, rather than a cause, of the accident. The defaults of Portland and Independent, on the other hand, jointly contributed as proximate causes of accident, although the acts of Portland were subsequent in time.

Either or both of the stevedoring companies are liable to Oceanic on the theory of indemnity due under an implied contractual obligation or on the theory of liability for active negligence.

ARGUMENT

I. A STEVEDORING CONTRACTOR IS OBLIGATED TO INDEMNIFY A SHIPOWNER FOR LOSS CAUSED THE SHIPOWNER AS A RESULT OF THE CONTRACTOR'S BREACH OF AN OBLIGATION TO PERFORM SERVICES PROPERLY.

In *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), it was established that a shipowner, who has been held liable to an injured

longshoreman for either unseaworthiness of a ship or negligence in failing to provide a reasonably safe place to work, may recover full indemnity from a stevedoring contractor whose negligence proximately caused the injury. Liability may be imposed whenever the contract between the shipowner and the stevedore may be interpreted so as to require the stevedore to perform its services in a workmanlike manner. An agreement is implied on the part of the stevedore to indemnify the shipowner if, through failure of the former to perform its services in a reasonably safe manner, someone, such as one of the stevedore's employees, is injured and the shipowner is required to pay damages for the injury.

Portland expressly contracted with Oceanic to indemnify it for the damages Oceanic has been compelled to pay to Swanson, for it agreed to be responsible for any and all loss or injury to persons arising through its negligence or fault. If the promises were not express, they would be implied. The *Ryan* case laid to rest any notion that an express agreement is necessary. It was there stated (pp. 132-134):

"2. The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused it by the contractor's improper stowage of cargo.

"The answer to this is found in the precise ground of the shipowner's action. By hypothesis, its action is not based on a bond of indemnity such as it may purchase by way of insurance, or may require of its stevedoring contractor, and which expressly undertakes to save the shipowner harmless. If the shipowner did hold such an express agree-

ment of indemnity here, it is not disputed that it would be enforceable against the indemnitor. * * *

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

* * *

"See *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.*, 196 U.S. 217; *Brown v. American-Hawaiian S. S. Co.*, *supra*; *Crawford v. Pope & Talbot*, *supra*, [1953 A.M.C. 1799, 206 F.(2d) at 792-793]; *American Mutual Liability Ins. Co. v. Matthews*, *supra*, [1950 A.M.C. 1272, 182 F.(2d) at 323-325]; *Rich v. United States*, *supra*; *Bethlehem Shipbuilding Corp. v. Gutradt Co.*, *supra*; *Mowbray v. Merryweather*, *supra*; *Dunn v. Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 67 N.E. 439."

Although the *Ryan* decision gave the ultimate sanction to this theory of liability, it was not an innovation. The theory was applied by this Court in 1926 in *THE ECUADOR (Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.)*, 10 F. 2d 769. Damage to cargo rather than injury to a human being was the cause of loss in

the case, but the shipowner, having been held liable to the damaged owner, was permitted to recover from the ship repairer for its negligent breach of contract which was the proximate cause of the damage.

The Court of Appeals for the Second Circuit also anticipated the *Ryan* decision by allowing the impleading of a ship-cleaning company in a suit brought by its own employee against the shipowner. *Rich v. U. S.*, 177 F. 2d 688 (1949).

This Court further showed the way in *U. S. v. Arrow Stevedoring Company*, 175 F. 2d 329, 333, cert. den. 338 U.S. 904 (1949), where the theory of contractual indemnity was effectuated by permitting the government, as shipowner, to recover from a stevedoring contractor who had been negligent in using a hatch cover known to be defective. In that case, the contract was quite explicit in fixing the relationship of the parties. But the same explicitness is no longer necessary because the *Ryan* rule implies all that is necessary. The result is the same. *All that need be shown to impose liability on the stevedoring contractor is proof that its employees were actively negligent by using equipment known to be defective.* The shipowner may be liable to the injured employee for providing the defective equipment, but the ultimate responsibility is that of the contractor who, with knowledge of its condition, permitted it to be used.

The *Ryan* case was also anticipated by the Court of Appeals for the Third Circuit in *Read v. U. S.*, 201 F. 2d 758 (1953). It was there held that a ship repairer who failed to furnish lights pursuant to its contract was liable

to the shipowner who had previously become subject to a judgment in favor of the ship repairer's employee, even though there was no express provision for indemnity in the ship repair contract. The same court, in *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 (1953), reiterated the principle of implied contractual indemnity.

Without reference to the *Ryan* decision, its rule was applied in *Pennsylvania Railroad Co. v. McAllister Lighter Line*, 240 F. 2d 423 (CA 2, 1957), where a barge owner, who had a continuing duty of care, was held bound to indemnify a charterer on an implied covenant to maintain a barge, the charterer having previously been held liable to a longshoreman injured by reason of a defect in the deck of the barge.

This Court considered the matter again in *American President Lines v. Marine Terminals*, 234 F. 2d 753 (1956), cert. den., 352 U.S. 926, and relied squarely on the *Ryan* case to permit a shipowner to recover from a stevedore. The shipowner had furnished a hatch beam which was known to itself and to the stevedore to be defective because of the lack of a sound locking device. It was held that whether the breach by the shipowner was negligence or unseaworthiness was immaterial, for the shipowner's breach was a passive and secondary force. The stevedore's activity in proceeding with work without using due care to remove the defective beam or otherwise to protect its employees was negligence for which it was liable to the shipowner on an implied agreement to indemnify for damages caused through breach of its implied obligation to perform its operations in a workmanlike manner.

The Court of Appeals for the Second Circuit most recently followed the *Ryan* doctrine again in *Shannon v. U. S.*, 235 F. 2d 457 (1956). In that case the shipowner had furnished "kinky" cables through the use of which by the contracting stevedore a longshoreman was injured. The stevedore was held to be liable to the shipowner because of breach of the implied promise to remove any known defect or to give notice of the defect to the shipowner so that proper equipment could be furnished. By proceeding with the work when the condition of the cables became known, the stevedore impliedly agreed to indemnify the shipowner for any loss resulting from their use.

In brief, the law as developed through these cases is that if a stevedore undertakes to perform work, and does not expressly preclude indemnity, the court will imply a promise to perform the work in a reasonably safe and workmanlike manner and a second promise to indemnify the shipowner for any loss resulting from a breach of the first implied promise. Knowing use of defective equipment breaches the first promise and the second becomes enforceable.

II. PORTLAND IS LIABLE UNDER ITS CONTRACT.

The contract between Oceanic and Portland is in evidence (Tr. 78). It provides in part as follows:

"The stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interest

of the Steamship Company in all respects, and to avoid any delay, loss or damage whatsoever to the Steamship Company.

"Duties of the Stevedore—Stevedore shall (a) At all times while the vessel is being worked provide not less than one general supervisor in direct charge of the work on each vessel; load and discharge cargoes, do and perform all the duties and functions usually and customarily done and performed by a stevedore; furnish all labor of every nature and description and all gear, mechanical or other equipment * * * necessary for the most efficient loading or discharging of the vessel, and transport the same to and from the vessel or the pier or terminal where the work is to be performed * * *.

"General labor and other provisions. 4-b. The stevedore recognizes the relation of trust and confidence established between it and the Steamship Company by the contract and agrees to furnish his best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable, and to cooperate fully with the Steamship Company in furthering the latter's interest. The stevedore further agrees to furnish efficient business administration and superintendence in performing the work.

4-c. Whenever any actual or potential labor dispute is delaying or threatening to delay the timely and efficient performance of the work, the stevedore shall immediately give notice thereof to the Steamship Company. Such notice shall include all relevant information with respect to such dispute.

* * *

7. As between the parties hereto, stevedore shall be responsible for any and all loss, damage or injury (including death) to persons, cargo, vessels, stores, apparel or equipment, * * *, or other property or thing arising through the negligence or fault of the

stevedore, its employees, gear or equipment and the Steamship Company shall be responsible for any and all such loss, damage or injury arising through the negligence or fault of the Steamship Company, its employees, gear or equipment."

Portland's express promises to perform work in an efficient manner and in accordance with the best operating practices, to exercise due diligence, to protect and safeguard the interests of Oceanic, and to avoid any loss or damage whatsoever to Oceanic are broader than the promises from which the court implied a covenant to perform work in a workmanlike or reasonably safe manner and a promise of indemnity in the *Ryan* case. These all-inclusive undertakings are further spelled out in the sections relating to the duties of the stevedore and the general labor and other provisions, culminating in the promise that the stevedore (Portland) *shall be responsible for any and all loss, damage, or injury to persons arising through the negligence or fault of it or its employees*. These promises amount to an express indemnity agreement. Even if they did not, all the promises prerequisite to the imposition of liability are implied.

Portland breached its contract.

When the Portland employees got down to the tween deck in No. 3 hatch of the SS VENTURA, they discovered a situation which the Trial Court has found to be dangerous. The chief supervisor of Portland inspected the area because the men would not work. Only Portland employees were present. They all knew of the condition. The walking boss decided upon a method of cor-

recting it, to-wit, building a floor over the hatch covers. The other employees concurred in the decision. The walking boss then left the scene, expressly granting to the gang boss and the ordinary longshoremen their choice as to the necessity or desirability of switching the No. 1 and No. 7 strongbacks.

This was the fateful decision. By refraining from exchanging the strongbacks, the hazard of lifting and carrying the individual hatch covers off and on the hatch would have been avoided. So long as all the covers were in place, none could slide and no one could fall through, but when any cover was removed, the one next to the space could slide. If any had a tendency to tip because of being bent, it might rock a little under foot, but it could not shift out of position so long as all the covers in the row were in place. It was obvious to the Portland employees that there was danger in stepping on hatch boards not secured or locked in place by having the entire row filled up. Notwithstanding that obvious danger, Portland allowed Swanson to walk on the hatch covers while replacing them. Safety was ignored. The covers could have been put on at each side and shoved in toward the middle without walking on them, if it were necessary to handle them at all and to switch the strongbacks; but the quickest and safest procedure would have been to build the floor over the square of the hatch without removing a single hatch cover. Unfortunately, longshoremen do not choose methods of work which consume the least amount of time, and Portland failed to exercise due care in supervising and directing these men, although knowledge of any and all

dangers was imputable to it through the supervisors present.

The decision to switch the strongbacks was made in the absence and without the consent of any employee of Oceanic. The decision was entirely that of the employees of Portland. Everything was under their control. They asked no advice and sought no assistance from Oceanic except a direction as to the location of lumber.

The only active or primary force which came into play was the work of the Portland employees. Oceanic neither participated in the work in any way nor approved it. The Trial Court found some of the hatch covers were defective, but that was a passive condition. Even if the hatch covers were defective, Portland was actively negligent in using them (allowing Swanson to walk on them), with full knowledge of the defect, and thereby became liable just as the stevedore in the *Ryan* and *American President Lines* and other cases cited above.

The action of the gang boss and the longshoremen cannot be reconciled with the duty of Portland to use due diligence, to work in the most efficient manner and in accordance with the best operating practices and to avoid any loss or damage to Oceanic. In addition Portland's employees neglected to use the best skill and judgment in planning, supervising and performing their work, for the chief supervisor failed to exercise his own authority and judgment, leaving the final choice of methods up to the gang itself. Hence, Portland breached its contract, both the express provisions and provisions implied under the *Ryan* decision.

Portland's activities were the primary and active cause of injury to Swanson.

Leaving Independent out of the picture for the moment, as between Oceanic and Portland the defective or dangerous condition of the hatch was obvious and was immediately recognized at the time Portland's employees went to work. It was the cause of the conference between the walking boss, the gang boss and the long-shoremen, which resulted in an agreement to correct it by building a wooden floor over it. As the walking boss put it, they "held kind of a little caucus down there" (Tr. 258).

Because of this state of the evidence, the findings of the Trial Court with respect to the proximate cause of the accident are challenged. There is no evidence to support the finding that either negligence of Oceanic or unseaworthiness of the ship was a primary or active force in any way. On the contrary, the evidence is crystal clear that the defective condition of the hatch was a static condition and that Oceanic was absolutely passive. Hence, whether unseaworthiness or negligence was involved, either was only a secondary force, completely superseded by the active negligence of the Portland employees.

The finding that negligence of Oceanic or unseaworthiness of the ship was a proximate cause of injury to Swanson is clearly unsupportable and erroneous. No injury could have occurred if Portland's employees had not acted. They refused to work at first and then, among themselves, determined the method to be followed. The

method they selected resulted in injury to Swanson. They could have refused to proceed or they could have used a safe method. They chose to do neither, but selected the means which allowed them the most work, regardless of the fact that it subjected Swanson to serious and unnecessary risks. Portland cannot escape its responsibility for the result. The careless disregard of the risk to Swanson cannot be reconciled with its express promise to perform in an "efficient manner and in accordance with the best operating practices, to exercise due diligence . . . and to avoid . . . loss to" Oceanic. Nor can it be reconciled with the *implied* duty to perform in a careful and workmanlike manner. The breach of these obligations, unknown to and not participated in by Oceanic, caused the accident. For these reasons, Portland is obligated to indemnify Oceanic for the sum paid Mr. Swanson plus costs and attorneys' fees incurred in the action. No other result is possible under the *Ryan* and *American President Lines* cases.

III. INDEPENDENT IS LIABLE UNDER ITS CONTRACT.

The contract between Independent and Oceanic reads in part as follows:

"The above rates will include the following services of the contractor:

"(a) The supplying of all necessary stevedoring labor including winchmen, hatch tenders and foremen, and all stevedoring direction and supervision requisite or necessary for the proper and efficient conduct and control of the work as well as any equipment and labor needed in switching cars, etc.

“(c) The removal and replacing of hatch covers, beams, strongbacks at hatches where any stevedoring is conducted; * * *

* * *

“(e) The laying, removing and other handling of all dunnage used or intended to be used in connection with the cargo.

“Responsibilities of the Parties.

“All stevedoring work and supervision, and all other services of the contractor under this contract shall be under the sole direction and control of the contractor, providing, however, that the operator and the master or officers in charge of the ship shall always have the right to reject the work if, in the opinion of the master or officers in charge of the ship cargo is so stowed or secured as to make the ship unseaworthy or unfit for her contemplated voyage, or to subject the ship or any of the cargo to unnecessary risk or danger. The contractor will be responsible for loss or damage to the ship, its equipment, and cargo, through or as a result of its negligence. * * * Contractor shall carry insurance against his liability for damage caused through his fault or negligence to the property of others, such insurance to be in the amount of not less than \$250,000.00 each action.”

The obligations of Independent were similar to, although not expressed as broadly as, those of Portland. Promises to supply all necessary labor and all direction and supervision requisite or necessary for the *proper and efficient conduct and control of the work* are the same type of promises from which the court must, under the *Ryan* case, imply an agreement to perform work in a safe and workmanlike manner and an agreement to indemnify.

Independent breached its agreement and furnished a proximate cause of the accident.

Independent expressly agreed to remove and replace hatch covers, beams and strongbacks and to do so in a proper and efficient manner. Yet its employees failed to replace the No. 7 strongback and hatch covers so that they were level with the deck as they should be. There is no dispute about these facts. The only issue with respect to Independent is whether this breach by Independent was a proximate cause of the injury to Mr. Swanson.

Independent knew or reasonably should have known that cargo operations would have to be carried on in the tween deck of the No. 3 hatch. It is obvious that a ship is unloaded only to be loaded again. It is incontrovertible that Independent knew or should have known that the unsafe condition left by its employees would have to be remedied by the next gang of longshoremen working in that hatch. Independent also knew or should have known that work could be done in the tween deck only if a wooden floor were built on top of the hatch covers or if the No. 7 strongback was properly seated in the slots and the hatch covers laid level with the deck. Either of these procedures was necessitated by the manner in which Independent had done its work. Whatever hazard was involved in removing and replacing the hatch covers, Independent knew of it, for its own men had done that work; yet it left the vessel with a condition which necessitated corrective measures.

As between Independent and Oceanic there can be no dispute that the only party responsible for the creation

of the dangerous condition was Independent itself. If Independent had properly replaced the strongback and hatch covers, Swanson and his fellow employees would have had no reason at all to remove and replace them. The danger to which Swanson was subjected by Portland would never have arisen. Oceanic was liable to Swanson because it owned the ship, but the creation of the dangerous condition with which Oceanic was charged was solely the result of the negligent performance by Independent's employees of the work they were hired to do. Oceanic played no part in the creation of the dangerous condition. Hence, as between it and Independent, there can be no argument that the part played by Oceanic was merely passive and secondary.

It cannot be gainsaid that Swanson would not have been injured if Independent had done its job properly.

IV. OCEANIC DID NOT CONTRIBUTE TO ANY PRIMARY OR ACTIVE CAUSE OF INJURY.

The injury to Swanson was caused by a combination of the negligence of Independent in creating a condition which called for correction and the negligence of Portland, or, allowing for the propensity of longshoremen to correct it. Portland could have floored the hatch as it lay, or, allowing for the propensity of longshorement to prolong work, it could have acquiesced in their desire to exchange the strongbacks and still have done so safely by replacing the hatch covers from each side, row by row, instead of allowing men to walk on them when they were subject to sliding because they were not all in place, locking each other against the hatch coamings.

The chief supervisor knew the condition could be corrected safely without removing hatch covers, but abdicated his own authority and common sense by allowing the men the option of choosing the other method. Then, when they decided to switch the strongbacks, he failed to stay on the job to see that they didn't walk on hatch boards which were subject to sliding or shifting in any row that was only partially filled. Neither of the safe procedures would have subjected the injured man to the risk which resulted in his fall.

Oceanic was an innocent bystander, placed in the unfortunate position of being absolutely liable for a condition which it did not create and did not control. The real question before the Court should be whether liability for indemnity is Portland's only or whether Portland and Independent should be held liable jointly. This is a matter of causation.

In dealing with the question of causation, the Restatement of Torts specifies in Section 433 the elements to be considered in determining whether conduct is a substantial cause in bringing about harm to another. These elements are as follows:

“(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;

(c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has

created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(d) lapse of time."

In applying the first factor to this case, it is obvious that the carelessness of Portland's employees in subjecting Swanson to the risk of walking on the hatch boards on a partially filled row was a primary factor and had the immediate effect of producing his injuries. That negligence was the last link in the chain of causation. The carelessness of Independent in replacing the No. 7 strongback and the hatch covers resting upon it in a faulty manner was the preceding link. It contributed to producing harm to Swanson because the dangerous condition required corrective action.

If the bent or twisted condition of any of the hatch covers contributed to the accident in any way, it was merely a passive condition upon which Independent and Portland subsequently acted. If Independent had placed the strongback properly in its slots and put the hatch covers down flat, the way they were before Independent's employees worked on them and the way Portland's men eventually put them, the bent condition of some of the hatch covers would have been completely harmless. It would have been impossible for Mr. Swanson to have sustained the injuries which he did. If the hatch covers had not been removed, Swanson could not have fallen through the opening. The condition of the hatch covers themselves could have had no effect whatever if some had not been removed. Whether they were bent, twisted or "dished" had no active part in the causation of the accident. Even if it were necessary or desirable to put

a floor of lumber on top of them, no one could have fallen through. There was no danger of that until one or more were removed and someone walked on others near the opening. There would have been no such removal if Independent had done its job or if Portland had used a safe method. Therefore, by the first test of the Restatement, Oceanic is not responsible for a proximate cause.

Using the second test, looking back from the harm to the negligent conduct of Portland, it does not appear extraordinary that a steel hatch cover resting with one end on a steel hatch coaming and the other on a steel beam could slide from the pressure of a man stepping on to it, if it were not blocked in place. It is no surprise that the negligence of Portland in permitting or ordering Swanson to walk on a hatch cover, insecure because it was next to a blank space, should have resulted in harm. Similarly, it is no strain on reason to see that the negligence of Independent produced a situation which required correction. On the other hand, Oceanic's innocence of the creation of the condition and of the means taken to correct it makes it impossible to urge that the covers alone, if properly put in place, could have been expected to bring about harm.

By the third test, Portland's negligence is plainly seen, for the activities of its employees were continuous up to the time of the injury to Swanson. Although Independent was not active at the time the harm resulted, it created a situation which continued until it was joined by the active negligence of Portland; then the combination of the condition negligently created by Independent together with the active negligence of Portland produced

the harm which befell Mr. Swanson. Again the situation of Oceanic differs. The bent or twisted condition of the hatch covers was harmless, if not acted upon by the others. The covers had been in use for a long time and had not been the subject of any complaint known to Oceanic. When the strongbacks were properly seated and the covers laid in place, they locked each other in position so that no slipping or sliding was possible which would permit a person to fall into the hold. They had to be acted upon by others to have any connection with the accident to Swanson.

The factor of lapse of time relieves neither Independent nor Portland of its responsibility. There was no intervening period of time during which the effect of either's carelessness became attenuated or unknown factors may have come into operation.

The second test referred to above was transferred to Section 435 in the 1948 Supplement to the Restatement, which now reads as follows:

"(1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

"(2) The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

The test under the second part of the revised Section 435 is the same as under the second part of Section 433. The first division of Section 435, dealing with foreseeabil-

ity of injury, does not define proximate cause but simply eliminates foreseeability as an important factor.

The most that need be shown is that some risk was foreseeable, not that the particular type of accident would happen. See *Smith v. Shevlin-Hixon Co.*, 157 F. 2d 51 (CA 9, 1946).

As between Swanson and Oceanic, the latter has been found legally responsible for the results of the stevedoring contractors' negligence, but, as between Oceanic and each of the contractors, whoever is responsible for the proximate cause of the accident must respond in a claim for indemnity.

Since both Portland and Independent were both negligent and the negligence of each proximately contributed to the accident of Swanson, let them argue whether only one or both should answer in indemnity. As to Oceanic, the negligence of each was an intervening and active force.

In determining Oceanic's connection to the ultimate result,

"A better analysis is to regard the intervening force [acts of Independent and Portland] as a risk or hazard and to ask whether its foreseeability was such as to make defendant's [Oceanic's] act negligent with regard to it. It is better, in other words, to inquire whether defendant's duty extends to such a risk as the intervening force, because the question in this form focuses attention on a more significant and less fictitious problem than that of cause." 2 Harper and James on Torts, 1143.

This test helps determine the extent of Oceanic's duty. Did it extend so far as to require Oceanic to an-

ticipate that Independent would create the dangerous condition by failing to seat a strongback which competent longshoremen could place in position? Did the decisive duty extend so far as to require it to foresee that Portland would use a careless method of correcting the condition? When the duty is conceived in these terms, it is plain that Oceanic played no active part and the negligence of the other parties intervened and became the only active causes.

The only thing pertaining to Oceanic which could be complained of is the hatch covers themselves. The strongbacks were satisfactory; the fact that they were properly seated in position when replaced by Portland's men is conclusive. The Trial Court relied on proof that some hatch boards were bent, twisted or dished, but failed to make any suggestion as to how their condition had any connection with the failure of Independent to seat No. 7 strongback. There was no connection, of course. Likewise, the Trial Court failed to make any finding or suggestion as to how the condition of the hatch boards had any connection with the failure of Portland to build a floor on the square of the hatch without exchanging strongbacks, or how their condition required that Swanson walk on them.

How the Trial Court could reason that the hatch covers, bent or flat, were a proximate cause, is inexplicable. The part they played was passive. Whatever danger they presented was known, yet the two contractors ignored the risks and set the stage for the accident. Any finding conceiving the hatch covers themselves to be the cause of the accident is wholly inconsistent with

the evidence. If Independent had not carelessly replaced the strongbacks, No. 7 would not have been raised three or four inches out of place. If No. 7 had not been raised out of place, Portland's men would not have taken off four rows of covers and exchanged No. 1 and No. 7 strongbacks. If the hatch covers had not been taken off, Swanson would not have fallen. The case is as simple as that. Even if enough of the hatch covers were bent or twisted or dished so that the square of the hatch needed to be covered with lumber for a good working surface, that task could and would have been safely done without any risk at all to Swanson. It was not the condition of the hatch covers which caused a risk and an accident; it was the removal and replacement of them which did that. The removal and replacement was necessitated solely by the acts and decisions of the stevedoring contractors.

Portland was the more flagrant violator for it could easily have avoided any risk and overcome the effect of Independent's wrongdoing. Portland was in exactly the same situation as the contractor in the *American President Lines* case, of whom this Court said:

"Marine was in full control of the work and was in charge of this very situation. After Marine was notified of the defective beams by the shipowner, the shipowner did nothing to increase the hazard or to cause the breach of contract by Marine. Marine openly and plainly breached its obligation to perform its work in a safe manner. We think it is no defense to that breach that American supplied the defective beam. The record shows that the negligence of the shipowner and the unseaworthiness of its ship were passive and secondary forces in causing the injury to Williams, and that the breach of

obligation by Marine was the sole active or primary conduct causing the injury.

* * * * *

"We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force." (p. 759)

Even if the finding of defective hatch covers as a cause were not in itself reversible error, the Trial Court ignored the *Ryan* and *A. P. L.* cases by failing to impose liability on Portland for using the defective equipment with full knowledge of the defects. The evidence on that point is clear, positive and uncontradicted. It may not be ignored and it requires that Portland indemnify Oceanic for its carelessness. It has been held in all the leading cases that the obligation to perform services in a safe and workmanlike manner is breached by knowingly using defective equipment.

V. A STEVEDORING CONTRACTOR IS LIABLE FOR INDEMNITY TO A SHIPOWNER FOR HARM RESULTING FROM ITS ACTIVE NEGLIGENCE.

Each of the stevedoring contractors is liable upon a separate and independent basis from the implied contractual indemnity theory of the *Ryan* case. This second theory has been well established by this Court in the two cases entitled *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329 (1949), and 175 F. 2d 333 (1949). In

each case there was an express contract of indemnity between the shipowner and the stevedoring company. In the first case, a longshoreman named Williams was injured by the falling of a metal hatch cover on the SS EDGECOMBE, a vessel owned by the United States. The hatch cover was intended to be secured in a raised position by two dogs held by pins. Both dogs were defective and their pins absent. As a result the dogs could not hold the heavy hatch cover erect, when raised by the longshoremen in the course of their work, and it fell on Williams. The District Court found that the defects were unknown to Arrow and denied indemnity, but the Court of Appeals ruled that the finding was clearly erroneous and reversed the judgment, allowing full indemnity. The court said:

"It is thus apparent that Arrow's supervisor knew that the ship would do nothing about the cover of port hatch No. 4 until 'sometime' during the day shift. Assuming that this transferred to the ship, to perform sometime in the morning shift, the obligation of Arrow's contract, later considered, to raise this hatch door, Arrow clearly owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed. Certainly the ship had no obligation to do more than it promised, that is to rig the door *sometime during* the day shift, not before the shift began to work." (p. 331)

The court went on to state that the defective condition could have been corrected, and summarized as follows:

"On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no

way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen. (Citing cases.)" (p. 331)

In the second case, the Court of Appeals rejected as clearly erroneous the finding of the District Court that the hatch cover had not been placed or arranged or secured or maintained in a careless or reckless or negligent manner by Arrow. The evidence that the supervisors for Arrow knew of the dangerous situation and proceeded to have their men work and that such work was not known to the ship's officers made the negligence of Arrow the sole proximate cause of the death of one Mitchell.

The case at bar cannot be differentiated from the *Arrow* cases, as regards the liability of Portland. In each one there was a known danger when the longshoremen went to work. There was also a known method of correcting the condition without subjecting anyone to the risk of walking on an unsecured hatch cover. Without notice to the shipowner, the stevedore in each case negligently chose to follow a dangerous procedure and injury to a man resulted from it. The only difference in the cases is that the danger here was created by Independent rather than the shipowner. This does not relieve Portland; it makes Independent a joint tort-feasor. The wrong committed by Independent continued in effect and had the wrong of Portland added to it. Portland had an opportunity to avoid risk to Swanson by using a safe method, but its failure to do so combined with the result of Independent's negligence to produce the injury

to Swanson. No matter how it is viewed, Portland cannot escape liability. It is in exactly the same position as Arrow and is obligated to indemnify Oceanic.

Two years after the *Arrow* cases this Court decided *United States v. Rothschild International Stevedoring Company*, 183 F. 2d 181. There the plaintiff was working on the tween deck of a ship, guiding a strongback into its slot on the port coaming, when the strongback fell and injured his hand. An employee of the stevedore testified that the ship's winches had slipped during previous use and that he had reported the matter to the ship's electrician and had warned the winch operator that the port winch was defective. Apparently nothing had been done about the situation by the shipowner. The District Court allowed judgment in favor of the plaintiff and denied indemnity against the stevedore. This Court reversed the latter ruling, saying:

"It is clear that both United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed. * * *

"It is clear from the undisputed evidence that Rothschild used its discretion in permitting Dillon to work where it knew there was a defect which was dangerous, relying upon chance that nothing would happen. * * * The winches were defective without any question of a doubt and whether they failed to work satisfactorily in stopping or upon or after stopping does not materially affect the situation. * * *

"We think the uncontradicted testimony of the

case entitles the United States to full indemnity over." (pp. 182-3)

Although it was not expressed in these precise terms, it is clear that the Court allowed indemnity on the theory that the shipowner was only passively negligent while the stevedore was actively negligent in permitting its employees to use a winch which it knew was defective.

These cases cannot be distinguished from the present one, and on their authority the judgment denying recovery by Oceanic must be reversed.

CONCLUSION

The law is now established beyond cavil that a stevedoring contractor who fails to perform services in a safe and workmanlike manner is liable for indemnity to a shipowner who has been compelled to pay damages to a man injured as a result of the carelessness of the contractor. That defective equipment was furnished by the shipowner is no defense in the action for indemnity if the defect was known to the contractor and the equipment was nonetheless used. The contractor's negligence in using the defective equipment is the proximate cause of injury to its employee and the passive negligence or unseaworthiness is not.

In this case there was more than a defect in some hatch covers. There was a creation of a dangerous condition by one contractor and a negligent procedure in correcting it by the other. The dangerous condition, like

the defective equipment in the leading cases, was known to the second contractor and it failed to use due care after becoming fully aware of the situation. It is pure speculation as to whether the condition of any hatch covers had any connection with the accident, but that issue is immaterial. The evidence is clear that the defects in any hatch covers were innocuous and would have continued to be so if the active negligence of the two contractors had not supervened.

Findings of the Trial Court on the issues of causation are clearly erroneous and must be set aside. The third-party defendants are obligated to indemnify Oceanic on either the implied contract theory or the active-passive negligence theory.

Respectfully submitted,

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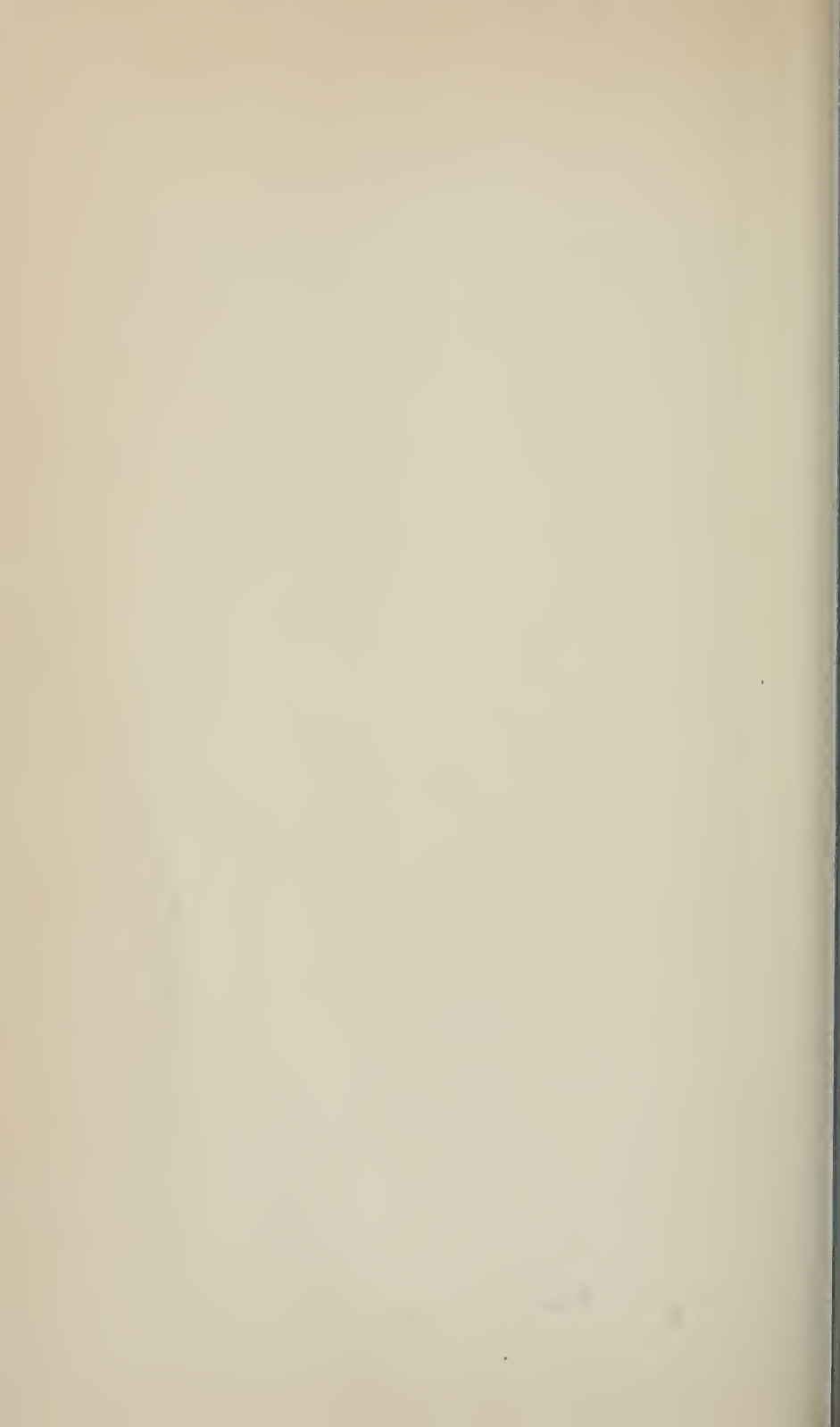
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APPENDIX

Exhibits identified, offered and received as evidence.

All Exhibits offered and admitted, Page 78 Transcript.



United States
COURT OF APPEALS
for the Ninth Circuit

OCEANIC STEAMSHIP COMPANY, a
corporation,

Appellant,

vs.

GUY W. SWANSON, INDEPENDENT STEVE-
DORE COMPANY, a corporation, and PORT-
LAND STEVEDORING COMPANY, a corpo-
ration,

Appellees.

**BRIEF FOR THE APPELLEES INDEPENDENT
STEVEDORE COMPANY AND PORTLAND
STEVEDORING COMPANY**

*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

FILED

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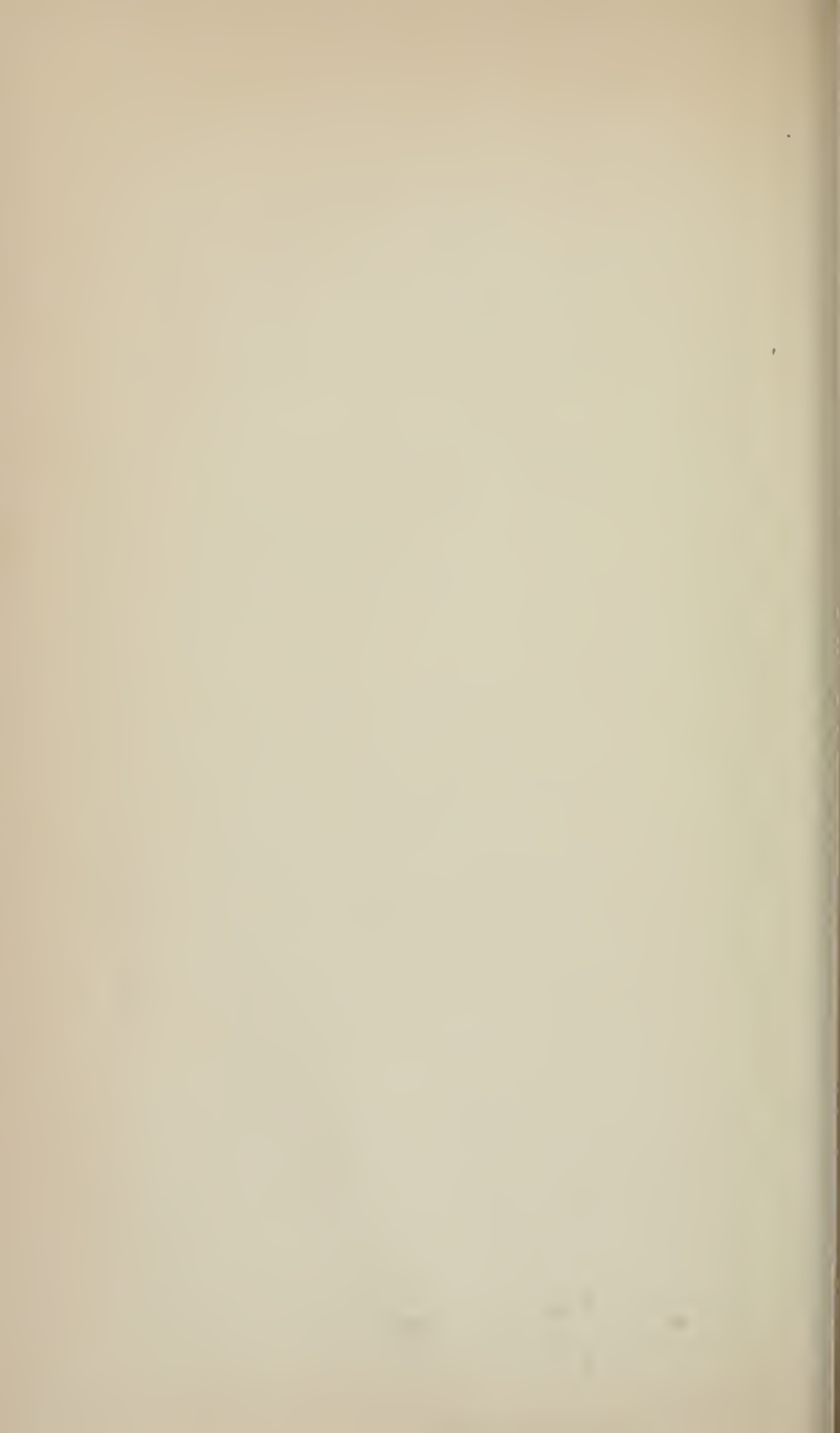


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**BRIEF FOR THE APPELLEES INDEPENDENT
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*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

STATEMENT OF THE CASE

Swanson, a longshoreman, obtained a judgment against Oceanic Steamship Company for injuries received on the latter's ship, VENTURA. The steamship company, as third-party plaintiff, sought indemnity

from these appellees. Judge McColloch denied indemnity. Oceanic appeals from that denial.

At the outset it is well to understand that this is an action on contract. The contracts, therefore, must be looked to to determine the relationship of the parties. Oceanic contends that the stevedore companies breached their contracts by performing the work negligently.

Judge McColloch held:

1. That neither stevedore company breached its contract;
2. That neither was negligent;
3. That none of the acts of which Oceanic complained was a proximate cause of the accident to Swanson; and
4. That the sole proximate cause was the unseaworthiness of the ship's hatch covers, and the negligence of Oceanic in that respect.

These are findings of fact. Even if this case were to be tried *de novo*, the evidence would compel the same findings. But since it is not to be tried *de novo*, the only question before this Court is whether these findings are clearly erroneous. (*McAllister v. U. S.*, 348 U.S. 19, 20; 99 L. Ed. 20, 24). We intend to show that they are not.

THE FACTS

While the steamship was at Newport, Yaquina Bay, Oregon, the third-party defendant, Independent Stevedore Company, performed some work as an independent

stevedore contractor. Its contract is Exhibit 45A. There is nothing in it requiring especial attention. In it the stevedore company agreed to "handle the loading at Coos Bay and Newport" at certain rates and under certain conditions. In doing this work it "covered up" (i.e. replaced the hatch covers on) No. 3 lower tween deck hatch, and in so doing left the No. 7 strongback protruding slightly above the levels of the other strongbacks because it would not sink completely into its sockets; with the result that the ends of those hatch covers which met on this strongback were slightly elevated. Finding VI, Tr. 37. There was no cargo on top of this hatch. It was all plainly exposed. And the responsible ship's officers watched it being covered up, and knew of its condition. This would be their duty anyway. But we do not have to rely on that. It is plain from the evidence itself that they watched the covering up, knew the condition in which the hatch was left, and accepted it.

"Q. Did you as Chief Mate keep track of the loading at Yaquina Bay and *what the longshoremen did?*

A. No. We have a cargo boatswain. The *second officer, he keeps track of the work* along with the supercargo and the loading bosses." (Emphasis supplied.) Tr. 237.

"Q. Did you inspect the covering up of the hatch at Yaquina?

A. Not the covering up. I was down there when they took them off and checked up the hatchboards. *It was one of the other officers checked that, or I presume he did.*

Q. At Yaquina?

A. At Yaquina, yes.

Q. *You mean he checked the covering up?*

A. *I think so, yes.*

Q. It is the right of a Mate at any time he sees stevedores doing work on a ship that he doesn't approve of to stop the work, isn't it?

A. *That is right, yes.*" (Emphasis supplied.) Tr. 239.

When the vessel, a short time after, arrived at Portland, the third-party defendant, Portland Stevedoring Company, as a stevedore contractor, did some work on the vessel under its contract, Exhibit 45B, certain provisions of which will be adverted to later. As part of its work it was going to load lumber in this No. 3 tween deck, which necessitated the longshoremen walking over and working upon this hatch. Finding VII, Tr. 37. The hatch covers for this hatch, were of metal and were badly warped, dished, bent, defective and unseaworthy. In view of these conditions and the slight rise at No. 7 crossbeam, the hatch boss and longshoremen of Portland Stevedoring Company determined, before going to work on the hatch, to "floor off" the hatch by laying lumber on top of all the hatch covers of the whole hatch, thus making a floor covering the whole hatch, and so making it a safer place on which to work. Before doing this they found that the slight rise caused by the No. 7 strongback could be got rid of if they exchanged the No. 7 and No. 1 strongbacks, and that when so exchanged all the strongbacks would fit snugly and level in the sockets and all hatch covers would then be level. They therefore proceeded to do this, of course first removing the necessary hatch covers for the purpose, and replacing them after the exchange had been made. Findings VIII and IX, Tr. 38-9.

"This work of replacing the hatch covers was merely the normal, routine work of covering up the hatch by placing the hatch covers on the strongbacks, which were now perfectly in place. It was while doing this that plaintiff Swanson, because of the aforesaid defective and unseaworthy condition of the hatch covers, and without any fault on the part of third-party defendants, fell into the hold and was injured." Finding IX, Tr. 38.

"The plan to floor off the hatch with lumber had been concurred in by the ship's supercargo, who cooperated with the hatch boss of Portland Stevedoring Company in furnishing lumber for that purpose, and said plan was later carried out." Finding X, Tr. 38.

"Third-party defendant Independent Stevedore Company was not negligent and did not breach its stevedoring contract because of the manner in which it set the strongbacks and covered up the hatch at Yaquina Bay, or at all, and its acts in that regard were not a proximate cause of plaintiff's injuries, nor can it be supposed that they were within the contemplation of the parties when said stevedoring contract was made." Finding XI, Tr. 38.

"Third-party defendant Portland Stevedoring Company was not negligent, nor did it breach its stevedoring contract in any particular, by or because of the manner in which it did the work at No. 3 'tween deck hatch, as aforesaid, nor in respect of any of those facts, things or circumstances which caused plaintiff's injuries, or at all." Finding XII, Tr. 39.

"The said defective hatch covers were tendered to Portland Stevedoring Company by Oceanic Steamship Company, and the Stevedoring Company was invited by the Steamship Company to use them as they were. There was no duty on the Stevedoring Company to point out to the ship the defects in the hatch covers, and the Stevedore

Company, in flooring off the hatch, as aforesaid, was making the hatch a safer place upon which to work." Finding XIII, Tr. 39.

"The said hatch covers were unseaworthy as aforesaid, and the third-party plaintiffs were negligent in permitting and allowing them to become in such condition, and in failing to provide good and sufficient hatch covers. Third-party plaintiffs and the ship's officers knew of this condition." Finding XIV, Tr. 39.

"The sole and proximate cause of the injuries to plaintiff Swanson was the said defective and unseaworthy condition of the hatch covers and the negligence aforesaid, and his injuries are in no way attributable to either of the stevedore companies." Finding XV, Tr. 39-40.

ARGUMENT

INDEPENDENT STEVEDORE COMPANY

The case against Independent must fail for several reasons:

1. The most obvious and compelling reason is that Independent's act in leaving No. 7 cross-beam, and the tip ends of the hatch covers resting on it, slightly elevated can by no stretch of reasoning be considered a proximate cause of Swanson's accident at all. For when Swanson got hurt, the beam had already been removed by Portland Stevedoring Company and exchanged with No. 1 beam, so that all beams were then level. Independent's act in leaving the beam not completely sunk in its sockets had disappeared and was out of the case. So were the hatch boards which had been resting on it. They had been removed by Portland and were lying in

the wings of the tween deck. From that time on, Swanson and the other longshoremen of his gang were merely engaged in the normal and routine job of covering up a hatch where all beams were in place,—the easiest kind of a routine job, if the hatch covers themselves, provided by the ship had been seaworthy and not dished and warped out of shape. The plain, proximate cause of Swanson's fall was not the No. 7 beam nor the manner in which the hatch covers *had* rested on it. The plain proximate cause was, as the Court found, the defective, dished, warped, unseaworthy hatch covers. Findings XI and XV.

2. Another reason why the case against Independent must fail is this: It was not negligent; nor did it breach its contract. All it did was to cover up the hatch, leaving the No. 7 strongback not completely sunk into its sockets, so that the ends of the hatch covers where they met and rested on this strongback were slightly elevated above this hatch. But they still rested on the flanges of the strongback. They did not fall down, nor is there any proof that so placed (except for their own bad condition) they would have fallen down, and the condition was *open and apparent to anyone*. For all Independent knew, it might have been the intention to take them off at the next port of call for further loading into that hatch, or for the stevedores at that port to rearrange them at that port for their own purposes,—a very common practice. The Trial Court therefore properly found that Independent was not negligent and did not breach its contract. Finding XI.

3. A third reason why the case against Independent must fail is this: Swanson's fall in replacing the hatch covers can in no way be regarded as within the "contemplation of the parties" when Independent entered into its stevedoring contract with Oceanic. Finding XI. As your Honors well know, the law is different between torts and contracts. In torts the damages must result as a proximate cause of the tort, but need not be foreseeable. In contracts, on the other hand, the breach of contract must be not merely the proximate cause of the damages, but in addition, the damages must be such as were reasonably foreseeable and in the contemplation of the parties, as likely to follow from a breach of the contract. It can hardly be said that Independent could foresee that in any rearrangement of the hatch covers by a future stevedore, for its own purposes, a man, in performing the purely routine work of covering up, would fall,—barring of course the faulty hatch covers, which were always a menace, and no responsibility of Independent's.

"In an action for tort, the damages recoverable may include all injuries or losses which are the natural, proximate, and probable consequence of the wrong complained of, and it is often stated in contract actions that the damages must be the natural and probable consequences of the breach of the contract. In actions upon contracts, however, the damages must also be such as can be said to have been within the contemplation of the parties at the time of the making of the contract." 15 Amer. Jur., Damages, §18.

"Compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made." Williston on Contracts, Vol. 5, §1347.

The distinction is also pointed out in Sedgwick on Damages, 9th Edition, Vol 1, §142.

4. Even if Independent's act were a breach of its contract with Oceanic (which was not the case), still Oceanic could not recover an indemnity, because its own wrong in furnishing the unseaworthy hatch covers would preclude it.

The Halcyon case, 96 L. Ed. 318;

The Hawn case, 98 L. Ed. 143;

The Matthews case, 182 F. (2d) 322.

PORTLAND STEVEDORING COMPANY

There is no case against Portland Stevedoring Company because, as the Court found, it was not negligent and nowhere breached its contract with Oceanic. That contract provides in §1:

"The stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence *to protect and safeguard the interests of the Steamship Company in all respects*, and to *avoid any delay*, loss, or damage whatsoever to the Steamship Company."

The contract reiterates this in §4(b) of Part II, wherein it is stated that the stevedore "agrees to furnish its best *skill and judgment* in planning, supervising and performing the work, to make every effort to *complete the work in the shortest time practicable* and to cooperate fully with the Steamship Company in *furthering the latter's interest*." Exhibit 45B.

The Stevedore Company acted throughout strictly in accordance with these provisions when it found the uneven conditions and bad hatch covers at No. 3 hatch lower tween decks. It exercised its "best skill and judgment." (Lundstrom, the hatch boss who was in charge, was a man with 37 years' experience. Tr. 129.) It exercised "due diligence to protect and safeguard the interests of the Steamship Company" by *not allowing* its men to incur a possible hazard by working on the hatch, and thus give rise to a claim against the ship in the event of an accident. Instead, it protected the interests of the Steamship Company by leveling the beams and recovering the hatch, (turning the dished hatch covers upside down so that they would rest on their four corners and would not tip), and flooring off the hatch with lumber to make it safer to work thereon,—all in the interests not only of the men themselves, but of the Steamship Company.

In doing so it complied with the contract requirement "to avoid any delay" and "to complete the work in the shortest time practicable." If it had not acted as it did, all work at that hatch would have stopped and the delay to the ship would have been of indefinite duration and costly.

The theory of appellant was that the Stevedore Company "permitted" its men to work on this hatch when it was in a dangerous condition, citing *American President Lines v. Marine Terminals Corp.*, 234 F. (2d) 753. But that is just what the Stevedore Company did *not* do.

Instead it removed the alleged danger. How different that is from the American President Lines case, cited by appellant. (234 F. (2d) 753). In that case the ship told the stevedore to *remove* all the defective strongbacks from the hatch and lay them to one side on the deck. If the stevedore had done this, the *unseaworthy condition* of the ship would have been *removed* and the ship would have become, so far as the immediate work was concerned, completely seaworthy. The element of unseaworthiness would have been out of the case. The stevedore did not do this. It allowed the defective strongbacks to remain in place and thereby *made the ship unseaworthy* in that respect. It created the unseaworthiness. The act of the stevedore was grossly negligent and the court held that it violated its contract to do the work safely. In the present case, the Portland Stevedoring Company did the very thing for which the stevedore in the American President case was condemned for *not* doing,—namely, removing the alleged dangerous condition and making the hatch safe.

It is perhaps worthy of remark that, on this appeal, appellant has shifted his ground. The case against Portland was tried solely on the theory that Portland had “permitted” its men to work on the hatch boards knowing that they were unseaworthy. This is the specific and only charge made in the Pretrial Order. It is in these words:

“In allowing and permitting its stevedores, including the plaintiff, to work on the hatch boards knowing that the said hatch boards were unseaworthy, if in fact the said boards were unseaworthy as alleged by plaintiff.” (Tr. 11)

But on this appeal, appellant now contends that Portland was negligent and breached its contract, *not* in permitting its men to work on the hatch, but in exchanging the beams, levelling off the hatch and putting a floor on top of it. Specification of Error No. 8 says:

“The Trial Court erred in failing to find that Portland was a primarily and actively negligent party whose negligence in permitting its employees to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay, was a proximate cause of the accident to Swanson.” Brief, p. 9.

And again, in Specification of Error No. 13, appellant says that the contract obligation

“ . . . was breached by Portland by its negligent performance of its work in allowing its employees, particularly Swanson, to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay.” Brief, p. 10.

And the text of the Brief is filled with arguments to the same effect. For example,

“This was the fateful decision. By refraining from exchanging the strongbacks, the hazard of lifting and carrying the individual hatch covers off and on the hatch would have been avoided.” Brief, p. 20.

“The decision to switch the strongbacks was made in the absence and without the consent of any employee of Oceanic. The decision was entirely that of the employees of Portland. Everything was under their control.” Brief, p. 21.

“The action of the gang boss and the longshoremen cannot be reconciled with the duty of Portland to

use due diligence, to work in the most efficient manner and in accordance with the best operating practices and to avoid any loss or damage to Oceanic." Brief, p. 21.

"No injury could have occurred if Portland's employees had not acted. They refused to work at first and then, among themselves, determined the method to be followed. The method they selected resulted in injury to Swanson." Brief, pp. 22-3.

"If the hatch covers had not been removed, Swanson could not have fallen through the opening." Brief, p. 28.

In short, appellant has departed from the sole allegation in the Pretrial Order on which the trial against Portland was had, and now in his Brief is criticizing Portland for doing the very thing which the stevedore in American President Lines was held liable for not doing, i.e., correcting the ship's defects insofar as possible and making the hatch safe.

Incidentally, it is somewhat curious to note in appellant's Brief, at page 30, that "the covers had been in use for a long time and had not been the subject of any complaint known to Oceanic." We say this is curious because appellant's witness, Cuthbert, Chief Mate on the VENTURA, testified that he had periodically inspected the hatch boards (Tr. 234), knew their condition (Tr. 235), knew they were in the same condition as shown in the photographic exhibits (Tr. 236), and that longshoremen and stevedoring companies had been complaining about their condition for four years (Tr. 243, Tr. 245). The Trial Court found that Oceanic and the ship's officers knew of their condition. Finding XIV.

The Portland Stevedoring Company was not negligent, and not only did not violate its contract, but it had the active consent and cooperation of the ship's supercargo in furnishing to the stevedore, on the latter's request, the lumber to floor off the hatch.

The plain and sole cause of the accident was the defective hatch covers. And the Trial Court has so found. Finding XV, Tr. 39-40.

Can it be the law that a ship can invite the stevedore to use hatch covers, which the ship tenders to the stevedore as being all right, and then when an accident happens, hold the stevedore liable for having accepted the ship's invitation? The answer to that is a plain "No."

It must be remembered that the obligation of the stevedore to the longshoreman is very different from its obligation to the ship. Its obligation to the longshoreman is to pay compensation under the Compensation Act,—not damages for a tort. Its obligation, on the other hand, to the ship is to perform its contract; but with the tools and appliances furnished by the ship. Its contract is qualified by that. And when it goes ahead and uses those tools and appliances which the ship has invited it to use,—it may have done a wrong to the longshoreman—but it has done no wrong to the ship. It has performed its contract.

As the Court of Appeals for the Second Circuit said in the Matthews case, 182 F. (2d) 322:

"In the case at bar, no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the

very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment, which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution. . . ." 182 F. (2d) at page 324.

We are convinced that Portland Stevedoring Company was without any fault whatever. It performed its contract perfectly and that is the only thing in question. If, however, Your Honors should think it was in any way wrong, contributing to the accident, still under the Hawn case, the Halcyon case, the Matthews case, *supra*, and others, where there was mutual fault, Oceanic could not have indemnity. We supplement what was said in the Matthews case by citing Hagans v. Farrell Lines in the Third Circuit, 287 F. (2d) 477. In that case Farrell was the shipowner. Hagans was the longshoreman. Lavino was the stevedore. The court said:

"Here, the ground upon which Farrell was held liable to Hagans was its own doing; as between Farrell and Lavino, Farrell had assumed the responsibility. If anything, Lavino only contributed to the happening of the accident. But if Lavino failed to perform its work perfectly, we are constrained to hold that, in the face of mutual violations, Farrell is not entitled to full indemnity, and, of course, it cannot have contribution." Page 483.

We do not close without noticing briefly appellant's reference to the contract provision that the stevedore (Portland) shall be responsible for any and all loss,

damage, or injury to persons arising through the negligence or fault of it or its employees. Appellant's Brief, page 19. This is lifted out of Clause 7 of the contract, quoted in appellant's Brief, pages 18 and 19. That clause is only the more or less common *reciprocal* clause whereby each party agrees to be liable for its own sole negligence. Even if the stevedore had been partly negligent—mutual fault—the clause would have no application. And of course it has no application where, as here, the Trial Court has found on ample evidence that the stevedore was not negligent at all.

CONCLUSION

This action for indemnity is an action in contract. The stevedore contracts must be looked to to determine the obligations of the stevedores.

The Trial Court has found that neither stevedore was at fault in any respect.

And that the sole proximate cause of the accident was the faulty and unseaworthy hatch covers.

Even if this were a trial *de novo*, the evidence would compel the same conclusion.

But it is not a trial *de novo*. The only question here is: Was the Trial Court's decision "clearly erroneous"?

We respectfully submit that it was not.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD.

United States
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for the Ninth Circuit

THE OCEANIC STEAMSHIP COMPANY,
Appellant,
vs.

INDEPENDENT STEVEDORE COMPANY,
a corporation, and PORTLAND STEVE-
DORING COMPANY, a corporation,
Appellees.

APPELLANT'S CLOSING BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

KENNETH E. ROBERTS,
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United States
COURT OF APPEALS
for the Ninth Circuit

THE OCEANIC STEAMSHIP COMPANY,
Appellant,
vs.

INDEPENDENT STEVEDORE COMPANY,
a corporation, and PORTLAND STEVE-
DORING COMPANY, a corporation,
Appellees.

APPELLANT'S CLOSING BRIEF

*Appeal from the Judgment of the United States District
Court for the District of Oregon.*

The casual overconfidence apparent in appellees' brief arises mainly from a disregard of these fundamental principles of the governing cases:

(1) An action for indemnity is not an action for contribution.

(2) Indemnity may be founded upon provisions implied from a contract as well as those expressed.

(3) An active fort-feasor may be compelled to indemnify a passive one, without an express contract for indemnity.

Appellees have also failed to evaluate the facts, relying on generalities without particularizing the specific proof which is supposed to support the findings below.

FACTS

Appellees labor under some misconceptions as to what facts are decisive. It is argued that Oceanic knew of the dangerous condition created by Independent. Although the evidence on the point is speculative, whether Oceanic had knowledge of the dangerous condition is unimportant. It is not a deciding factor in the case under any circumstances. An argument concerning that matter is a diversionary tactic to draw the Court's attention away from the decisive elements of the case. The only knowledge on the part of any party material to the case is the knowledge of both Independent and Portland of the existence of a dangerous condition. Knowledge on the part of the stevedores is a prerequisite for the imposition of liability upon them under *American President Lines v. Marine Terminals*, 234 F. 2d 753 (CA 9, 1956), cert. den. 352 U.S. 926. That knowledge is conclusively proved by the evidence in this case. The failure of the Trial Court to make a specific finding in that regard is one of the errors in the findings.

In addition to apodeictical proof of knowledge on the part of Independent and Portland of the danger in-

volving the hatch covers and the protruding hatch beam, the proof is also conclusive that Independent had the authority, the equipment and the manpower to have avoided the improper placement of the hatch beam originally. Likewise, Portland had the authority, the equipment and the manpower to correct the condition by flooring off the square of the hatch without subjecting Swanson to the risk involved in walking upon hatch covers in an unfilled row during the process of switching the No. 1 and No. 7 beams.

It is also beyond dispute that the procedure used by Portland in removing hatch covers and exchanging the strongbacks instead of merely flooring off the square of the hatch was done without the knowledge or consent of Oceanic. Oceanic's employee merely advised Portland's walking boss where he could get lumber. The lumber could and should have been used without removing any hatch covers.

The decision to undergo the risks of removing and replacing the hatch covers was solely that of Portland's employees, as is best illustrated by the testimony adduced by counsel for the appellees on cross-examination of Mr. Berg, Portland's walking boss:

"By Mr. Wood:

Q. I want to ask you a few questions, Mr. Berg. When the men refused to work there, wouldn't turn to, because of the dangerous condition of the hatch, was it on account of the bad condition of the hatchboards or the raised beam that they were afraid of?

A. It was both.

Q. Both of them?

A. Yes.

Q. When you found that they didn't want to

work under those conditions, you had a talk with the gang boss, Mr. Lundstrom [Portland's gang boss], did you?

A. Yes, sir.

Q. And you told him to floor up, cover the hatch up with lumber?

A. Right.

Q. You would go and get the lumber?

A. Yes.

Q. And you left it up to him to decide whether to change the beams or not?

A. Correct.

Q. Now, they could have floored up with lumber without changing the beams, as I understand it, but you thought it was better to change the beams first?

A. Right.

Q. Is that correct?

A. Correct." (Tr. 256-7)

Appellees have quoted the Trial Court's findings as though they settled all factual issues. This is error because the findings are not supported by substantial evidence. They are incomplete in many respects and erroneous in others, as shown in the opening brief. Appellees' selection is subject to the same faults.

Finding IX is erroneous because the work of replacing the hatch covers was not the routine work in the particular situation. It might be normal routine work where there is no dangerous condition, but the circumstances on the SS VENTURA made this something other than normal routine work. Those circumstances were that one beam was raised out of place and some hatch covers would rock slightly when stepped upon. They were unusual but there were ready means to overcome whatever risks were involved. If a feeling of in-

stability or danger resulted from stepping on a hatch cover which rocked slightly (but which could not slide when in a filled row) was obvious to Portland's employees before the work started, it was even more obvious that it would be dangerous to allow men to walk on such hatch covers in a partially filled row where an empty space would allow a hatch cover to slide. Reasonable men cannot differ on the proposition that Mr. Swanson could not have fallen through the hatch if no covers had been removed.

The Trial Court simply missed the point in assuming that work under these particular circumstances was normal and routine. If it had been normal and routine, the longshoremen would not have refused to proceed with the work. That fact alone disproves the finding. It was the careless manner in which the danger was corrected which caused injury. It is the same carelessness which entitles Oceanic to indemnity.

Finding X is misleading and erroneous because of its failure to state all of the material facts. It is true that Oceanic's supercargo cooperated by advising Portland's walking boss where lumber could be obtained, but that has nothing to do with what we have called the fateful decision: Portland's decision to remove hatch covers and exchange strongbacks. The lumber to which the walking boss was directed could and should have been used only to floor the area without making an opening through which a man could fall. Appellees reiterate on page 4 of their brief that the protruding strongback caused only a "slight rise," and from the testimony quoted above it is clear that the dangerous conditions

could have been corrected by flooring the square of the hatch with lumber without changing beams. Hence, the Trial Court was remiss in not stating the material fact that the decision to remove hatch covers and exchange the beams was exclusively that of Portland's employees and that Oceanic had no knowledge of it until after Swanson's accident.

Finding XI is erroneous. It is directly contrary to the explicit obligation of Independent as appears in its contract as follows:

"The above rates will include the following services of the contractor:

* * *

(c) The removal and replacing of hatch covers, beams, strongbacks at hatches where any stevedoring is conducted;

* * *

Responsibilities of the Parties.

* * * The contractor will be responsible for loss or damage to the ship, its equipment, and cargo, through or as a result of its negligence. * * *

That Independent's acts were within the contemplation of the parties to the contract is obvious from the above. The causal connection of Independent's acts has been explained in our opening brief.

Finding XII is erroneous and contrary to the evidence. This is a key finding as to Portland, and its invalidity has been explained in our opening brief and in this one.

Finding XIII is erroneous and misleading. It does not take into account the fact that Portland's employees were fully aware of the defect in the hatch and had the

authority, the physical means and the opportunity to correct it. Portland had the duty of making the hatch a safe place in which to work, but, more important in this case, it also had the duty to use reasonable and safe means in performing the first duty. Portland breached the latter duty by using a negligent method of correcting the known defect. It could have stopped work and awaited further instructions, materials or assistance instead of plunging ahead without the knowledge of Oceanic. Swanson was not subjected to the risk of falling through the hatch until Portland carelessly made the opening and allowed or ordered him to walk on the hatch cover next to it.

Finding XIV is misleading because it does not take into account the fact that the condition of the hatch covers was not the proximate cause of injury to Swanson. The hatch covers constituted a passive condition upon which the active negligence of the stevedoring companies operated as a proximate cause of injury to Swanson.

Finding XV is wholly erroneous and unsupported by the evidence, as is fully explained in the opening brief and in this one.

APPELLEES' ARGUMENT

The argument concerning Portland will be considered first.

Appellees' discussion of the Portland contract is merely another example of the smoke-screen method of

argument. The specious suggestion that the principal obligation of Portland was to save time could result only from the assumption that this Court will not trouble itself to read the entire contract. The portions quoted in appellant's opening brief but ignored by the appellees clearly show that Portland made express promises to indemnify Oceanic for its negligence.

Appellees must be aware of *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), but have neglected to concern themselves with any of the implied obligations imposed under its doctrine. Apparently appellees believe that if the recent developments of the law are ignored in their brief, this Court will accommodate them by doing likewise.

Perhaps appellees find the argument unanswerable that each of them had an obligation to perform services in a safe and workmanlike manner, whether or not the contract expressly imposed the obligation.

The attempt to distinguish the *American President Lines* case is without merit. This Court there held that a stevedore has the duty to correct a known defect by reasonable and safe means. In that case reasonable and safe means required the removal of defective strongbacks. In the present case Portland had the same duty to use reasonable and safe means to correct a known defect. Reasonable and safe means in this case required only the flooring over of the square of the hatch, not the make-work project of removing covers, exchanging beams and then replacing covers. Reasonable and safe measures did not require that procedure because the

known condition of the hatch covers would subject a man to an unnecessary risk in stepping upon a hatch cover which might rock under his foot and slide in an unfilled row.

The argument that it was proper to exchange hatch beams in this case because it was negligence not to remove one in the *American President Lines* case is, of course, absurd. The suggestion that exactly the same method of correction should be followed in each case is obviously groundless. This Court stated a legal principle in the *APL* case that it is the duty of the stevedore to use reasonable and safe means and to perform services in a workmanlike manner. In one case it may mean the removal of a hatch beam; in another case, where such removal subjects men to unnecessary risks, it means leaving the hatch beam in place and flooring it over with lumber. Appellees have confused the specific circumstance of one case with the principle of law which is applicable in all cases according to their circumstances.

Appellees have made the loose statement at the top of page 14 that Portland had the active consent and cooperation of the ship's supercargo. This is equally true and false, depending on what is referred to. It is true in that the supercargo impliedly consented to flooring the tweendeck by cooperating to the extent of advising the walking boss where lumber could be obtained. It is false, however, insofar as it refers to the principal issue of the case. Neither the supercargo nor any other employee of Oceanic knew of Portland's plan to exchange strongbacks and remove and replace the hatch covers,

and no employee of Oceanic gave any consent to that procedure. Opening part of the hatch created a risk which Oceanic did not cause, to which it gave no consent and of which it had no knowledge.

Appellees' argument as to Independent is concerned mainly with the issue of proximate cause. In reply to that we point out that Independent's negligence need not be the sole proximate cause. It was supplemented by the negligence of Portland. If Independent had not performed its work carelessly, there would have been no occasion for Portland to have engaged in the acts which caused injury to Swanson. It is suggested that Independent did not know what would happen in the next port, but it was not unlikely that the men would have to work in the tweendeck.

That Independent breached its contract and that it was careless cannot be gainsaid. No one can doubt for a second that the beam was not put into place properly and that it was Independent's employees who were at fault.

The argument that the consequences of Independent's negligent breach of contract cannot be the basis for indemnity has no merit. It would not have been made but for appellees' disregard of the *Ryan* and *American President Lines* decisions as well as the *Arrow** and *Rothschild*† cases.

**United States v. Arrow Stevedoring Co.*, 175 F. 2d 329 (CA 9, 1949), cert. den. 338 U.S. 904 (1949).

†*United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (CA 9, 1950).

The reliance upon *Halcyon Lines, et al. v. Haenn Ship C. & R. Corp.*, 342 U.S. 282; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, and *American Mutual Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (CA 2, 1950), is misplaced. It results from the failure to distinguish between contribution and indemnity. All those cases disallow claims for contribution. The *Halcyon* and *Hawn* cases don't even discuss the issue of indemnity. The *Matthews* case specifically holds that recovery can be had on a theory of contractual indemnity for failure to perform work properly. It anticipated the *Ryan* case in this regard and cited with approval *Rich v. United States*, 177 F. 2d 688 (CA 2, 1949), also cited in the opening brief. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (CA 3, 1956), is explainable either as a case of concurrent active negligence by both the shipowner and the stevedore or else as an aberration which is not controlling here because it is contrary to the *American President Lines* case.

Appellees' studied indifference to the recent cases is inexplicable. Although most of them were referred to in the opening brief, only the *A.P.L.* case was given any consideration in the answering brief. The separate theory of liability, resting upon the decisions of this Court in *United States v. Arrow Stevedoring Co.*, *supra*, and *United States v. Rothschild International Stevedoring Co.*, *supra*, has been totally ignored.

It was expected that appellees would rely on *American S.S. Co. v. Copp*, 245 F. 2d 291, and *United States v. Harrison*, 245 F. 2d 911, both decided this year by

this Court. Since they did not, we merely mention that the cases do not change the principles we rely on and are distinguishable on their facts.

CONCLUSION

Inasmuch as there is a body of law governing actions such as this, whether or not the appellees wish to recognize its existence, that law must be applied. In essence it is that stevedoring contractors who create risks or who voluntarily and carelessly proceed with work in the presence of known risks are responsible for the consequences of their actions.

Responsibility entails the indemnification of a shipowner to the extent of damages, costs, interest and attorneys' fees which the shipowner has been compelled to pay to a stevedoring employee injured as a result of the carelessness of the stevedoring contractor. Unless the stevedoring contractor can show that the employees of the ship were active tort-feasors, vague references to mutual fault provide no defense.

This shipowner is not precluded from recovering simply because an unseaworthy condition existed or because of passive negligence or the furnishing of a condition. In any of those circumstances a stevedore whose employees are the active tort-feasors must indemnify the shipowner.

The injustice of the Trial Court's denial of indemnity is dramatized by posing the following questions:

(1) Would the accident to Swanson have happened if Independent had properly set the hatch beams?

(2) Would the accident have happened if Portland had simply floored over the square of the hatch instead of removing the covers, exchanging the beams and permitting Swanson to walk on a partially filled row of hatch covers which Portland's employees knew might rock and slide under his feet?

(3) If Independent had not improperly placed the beam, and if Portland had merely floored the area without carelessly allowing Swanson to walk on a partially filled row of hatch covers, could the condition of the hatch covers have caused the accident?

None of these questions can be answered in the affirmative. The findings of the Court in effect answered them all in the affirmative, but the evidence does not support the findings. The defects in some of the hatch covers were and would have remained innocuous if the active negligence of the two stevedoring contractors had not supervened. Therefore, either or both of them must indemnify Oceanic on the implied contract theory or the active-passive negligence theory.

Respectfully submitted,

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No. 15659

United States
Court of Appeals
for the Ninth Circuit

OCEANIC STEAMSHIP COMPANY, a Corporation,

Appellant,

VS.

GUY W. SWANSON, INDEPENDENT STEVEDORE COMPANY, a Corporation, and PORTLAND STEVEDORING COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

SEP 13 1957



No. 15659

United States
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OCEANIC STEAMSHIP COMPANY, a Corporation,
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Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 8074

GUY W. SWANSON,

Plaintiff,

vs.

MATSON NAVIGATION COMPANY and
OCEANIC STEAMSHIP COMPANY,

Defendants and Third Party Plaintiffs,

vs.

INDEPENDENT STEVEDORE COMPANY,
a Corporation, and PORTLAND STEVE-
DORING COMPANY, a Corporation,

Third Party Defendants.

PRETRIAL ORDER

This cause came on for pretrial before the Honorable Gus J. Solomon, Judge of the above-entitled Court, on the 29th day of October, 1956. Plaintiff appeared by Howard K. Beebe, Esq., of Maguire, Shields, Morrison & Bailey, his attorneys. Defendants and third party plaintiffs appeared by Kenneth E. Roberts, Esq., of Mautz, Souther, Spaulding, Denecke & Kinsey, their attorneys. Third party defendants appeared by Erskine Wood, Esq., of Wood, Matthiessen, Wood & Tatum, their attorneys.

Agreed Statement of Facts

I.

That Matson Navigation Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That Oceanic Steamship Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That Independent Stevedore Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

IV.

That Portland Stevedoring Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

V.

That this action is a civil nature and the matter and amount in dispute herein exceeds the sum of \$3,000.00 exclusive of interest and costs.

VI.

That the plaintiff is a resident and inhabitant of the State of Oregon.

VII.

That plaintiff elected to pursue a remedy against a third party pursuant to the provisions of the

Longshoremen & Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees' Compensation, a formal notice of election to sue.

VIII.

That the plaintiff was employed as a longshoreman by the Portland Stevedoring Company and that on or about the 9th day of February, 1955, he was working on the SS Ventura, a vessel owned and operated by the Oceanic Steamship Company, and that while working on the said vessel he sustained certain personal injuries.

IX.

That shortly before the 9th day of February, 1955, the S.S. Ventura was loaded by the Independent Stevedore Company at Yaquina Bay, Oregon.

X.

That pursuant to contract the Independent Stevedore Company loaded the vessel at Yaquina Bay and the Portland Stevedoring Company loaded the vessel at Portland.

Contentions of the Parties

Plaintiff's Contentions as to the Issues of Liability

Plaintiff contends and the defendants deny that:

I.

On or about February 9, 1955, the SS Ventura and its appliances were in an unseaworthy condi-

tion in that the metal hatch covers were bent, twisted and dished so that they would slip, roll and turn when stepped upon and that the said unseaworthiness of said vessel was the proximate cause of the injuries and damages sustained by the plaintiff.

II.

At said time and place the defendants were negligent and failed to furnish plaintiff a safe place in which to work in that:

(a) The defendants maintained the hatch covers upon said ship in a bent, twisted, dished and unsafe condition;

(b) Said ship and its appliances were maintained in an unseaworthy condition by the defendants in that said metal hatch covers were bent, dished and twisted so that they would slip, roll and turn when stepped upon;

(c) Defendants were negligent in failing to provide and equip said ship with safe and stable hatch covers before having longshoremen, and particularly the plaintiff, work about and upon said hatch.

III.

While plaintiff was working on the said vessel and while in the scope and course of his employment he was caused to fall, as a direct and proximate result of the negligence of the defendants as aforesaid and as a direct and proximate result of the unseaworthiness of said vessel, as aforesaid, into the hold of the said vessel and as a direct and

proximate result thereof, plaintiff sustained the following injuries which are permanent and progressive and which have caused plaintiff great physical and mental pain and suffering and anguish, and which will continue to cause him to so suffer for the remainder of his life:

(a) severe and extensive cerebral contusions and concussions with marked cerebral edema and long-lasting coma which required surgery to the brain and skull and which resulted in unbalance and in-co-ordination of the skeleton muscles of plaintiff's back and legs;

(b) severe strain and sprain of the muscles, tendons, ligaments, bones, tissues and joints of the spine and neck;

(c) severe aggravation of pre-existing arthritis of the spine;

(d) traumatic myofibrosis;

(e) traumatic coccygodynia.

IV.

That as a further direct and proximate result of the said negligence of defendants and the unseaworthiness of said vessel, as aforesaid, plaintiff's earning capacity has been permanently impaired.

V.

As a further direct and proximate result of said unseaworthiness and said negligence of defendants, as aforesaid, plaintiff has been totally disabled from the date of said accident and has lost wages up to the time of trial in the sum of \$10,000.

VI.

As a further direct and proximate result of said unseaworthiness and said negligence of the defendants, plaintiff has incurred reasonable medical and hospital expenses in the sum of \$2,053.60, and will require medical attention in the future.

VII.

As a direct and proximate result of said unseaworthiness and said negligence as aforesaid, plaintiff has sustained special damages in the amount of \$. and general damages in the sum of \$150,000.00.

VIII.

Plaintiff is entitled to a jury trial of all issues of fact herein.

IX.

The third party defendants admit that the hatch covers were bent, twisted or dished, but neither admit nor deny that this constituted unseaworthiness, leaving that to the proofs and decision of the Court; deny that plaintiff is entitled to a jury trial; deny knowledge or information sufficient to form a belief as to the remainder of plaintiff's contentions.

Defendant's Contentions on the Issue of Liability
Oceanic Steamship Company contends and the plaintiff denies:

I.

That if plaintiff sustained any injuries such as are alleged in his complaint, such injuries were

caused in whole or in part by plaintiff's own negligence in the following particulars:

(a) Plaintiff failed to keep a proper lookout for his own safety and that any threat to his safety was open and apparent.

(b) That plaintiff continued to work on the hatches of the vessel without first ascertaining that the hatches on which he was working were securely placed.

Third Party Defendants' Contentions on the Issue of Liability

Third party Defendants contend and the plaintiff denies:

I.

That the plaintiff was guilty of negligence, which was the sole and proximate cause of his injuries in the following particulars:

(a) Plaintiff failed to keep a proper lookout for his own safety.

(b) Plaintiff worked on hatch boards of the vessel without first ascertaining that the hatch board on which he was working was securely placed.

Defendant's Contentions of the Issues of Indemnity Over Against Independent Stevedore Company

Defendant Oceanic Steamship Company contends and the third party defendant Independent Stevedore Company denies:

I.

That if defendant is held to be liable to the plaintiff by reason of any of the matters alleged in plaintiff's contentions that any and all such liability was caused by the fault and sole active and primary negligence of the third party defendant Independent Stevedore Company in the following particulars:

(a) In replacing the cross beams of #3 lower 'tween deck hatch so that the afterbeam was not fitted into its slot but protruded above the slot.

(b) In placing the fore beam of #3 hatch in the afterbeam position.

(c) In handling and using the hatch boards in such a manner that the same became unseaworthy if the hatch boards were in fact unseaworthy as alleged by the plaintiff.

II.

That the negligence set forth in paragraph 1 above constituted a breach of duty owed by the third party defendant Independent Stevedore Company, to the Oceanic Steamship Company to perform the loading in a workmanlike manner and to notify the Oceanic Steamship Company or the plaintiff on behalf of the Oceanic Steamship Company of any defects or dangers inherent therein.

III.

In that any and all liability, if any, in the within cause should be borne by the third party defendant

Independent Stevedore Company and in the event defendant Oceanic Steamship Company is held liable to the plaintiff in respect to any of the matters set forth in plaintiff's contentions, Oceanic Steamship Company has a right over against Independent Stevedore Company for full and complete indemnity, and if plaintiff is entitled to a judgment, said judgment shall be entered against Independent Stevedore Company and that the plaintiff's complaint against the Oceanic Steamship Company should be dismissed with costs to the Oceanic Steamship Company.

Defendant's Contentions on the Issue of Indemnity
Over Against Portland Stevedoring Company

Defendant Oceanic Steamship Company contends and the third party defendant Portland Stevedoring Company denies:

I.

That if the defendant Oceanic Steamship Company is held to be liable to plaintiff by reason of any of the matters alleged in plaintiff's contentions that any and all of such liability was caused by the fault and sole act of and primary negligence of the Portland Stevedoring Company in the following particulars:

(a) In allowing and permitting its stevedores, including the plaintiff, to work on the hatch boards knowing that the said hatch boards were unseaworthy, if in fact the said boards were unseaworthy as alleged by plaintiff.

II.

That the negligence set forth in paragraph I above constituted a breach of duty owed by the Portland Stevedoring Company to the Oceanic Steamship Company to perform the work of loading the vessel in a workmanlike manner and to notify the Oceanic Steamship Company or the plaintiff on behalf of the Oceanic Steamship Company of any defects or dangers inherent in the loading of the vessel and in particular as to any defects or unseaworthy condition of the hatch boards.

III.

In that any and all liability, if any, in the within cause should be borne by the Portland Stevedoring Company and that in the event the defendant, Oceanic Steamship Company, is held liable to the plaintiff in respect to any of the matters set forth in plaintiff's contentions Oceanic Steamship Company has a right over against Portland Stevedoring Company for full and complete indemnity, and that if plaintiff is entitled to a judgment such judgment should be entered against Portland Stevedoring Company and the plaintiff's complaint against the Oceanic Steamship Company should be dismissed with costs to the Oceanic Steamship Company.

Third Party Defendant Independent Stevedore Company's Contentions on the Issues of Indemnity Over.

Third party defendant Independent Stevedore Company contends, and Oceanic Steamship Company denies, that if the hatch beams in No. 3 'tween deck hatch were wrongly placed as contended by the Steamship Company, that was not a proximate cause of the accident; for it was the duty of the Steamship Company to remedy that alleged defect before turning the ship over to the Portland Stevedoring Company for loading; and that in any event, if said cross beams were wrongly placed, as claimed by the Steamship Company, which Independent Stevedore Company denies, such wrong placing was immaterial and not a proximate cause of plaintiff's injury since the Portland Stevedoring Company took the beams out and replaced them properly prior to Swanson's accident, and that there is no right to indemnity from this third party defendant.

Third Party Defendant Portland Stevedoring Company's Contentions on the Issues of Indemnity Over.

Portland Stevedoring Company contends and the Oceanic Steamship Company denies:

I.

That the hatch covers at No. 3 'tween deck hatch of the Ventura were warped, twisted, dished or bent and would not fit in place and that this was the

proximate cause of Swanson's accident (unless Swanson's own negligence was the proximate cause) for which this third party defendant is not liable, and that there is no right to indemnity from this third party defendant.

Issues on the Question of Liability

I. Question of Fact:

Was the S.S. Ventura unseaworthy, particularly relating to the condition of the hatch covers as contended by plaintiff?

Was the plaintiff negligent in any of the respects contended by defendants and third party defendants?

If the S.S. Ventura was unseaworthy in the condition of the hatch covers as contended by plaintiff, did such unseaworthiness proximately cause the plaintiff to fall into the lower hold of the vessel with resulting injuries?

What is the extent of plaintiff's injuries and what are his money damages?

What amount of wages did plaintiff lose up to the time of trial?

Was the plaintiff guilty of negligence in one or more of the respects contended by defendant and third party defendants which proximately contributed to the accident, and if so to what extent?

II. Question of Law:

Is plaintiff entitled to a trial by jury in view of the fact that he did not file a request for a jury trial within ten days from the last pleading?

Is the defendant Oceanic Steamship Company legally responsible to plaintiff for damages resulting to him from the accident?

Was plaintiff himself guilty of negligence which proximately contributed to the accident and his resulting injuries and if so to what extent does it deprive him of his right to damages?

On Question of Indemnity

I. Question of Fact:

(a) Did the third party defendant, Independent Stevedore Company, replace the cross beams of No. 3 lower 'tween deck hatch so that the afterbeam was not fitted into its slot but protruded above the slot, and did the Independent Stevedore Company place the forebeam of No. 3 hatch in the afterbeam position and handle and use the hatch boards in such a manner that the same became unseaworthy if the hatch boards were in fact unseaworthy as alleged by plaintiff?

(b) Did the third party defendant, Portland Stevedoring Company, fail to prevent the stevedore gangs and longshoremen, including the plaintiff, from working on the hatch boards when the said hatch boards were unseaworthy if in fact the said

hatch boards were unseaworthy as alleged by the plaintiff?

(c) Did either third party defendant fail to notify the Oceanic Steamship Company or the plaintiff on behalf of the Oceanic Steamship Company of any faults or inherent danger on the S.S. Ventura and in particular relating to the hatch boards and cross beams?

(d) Were such acts of the third party defendant a proximate cause of plaintiff's injuries?

II. Question of Law:

If the Oceanic Steamship Company is held to be liable to the plaintiff because of the unseaworthy condition of the hatch boards, would the Oceanic Steamship Company be entitled to indemnity over against the Independent Stevedore Company and/or the Portland Stevedoring Company, or both of them?

Exhibits

At the pretrial the following exhibits were admitted and may be introduced without further identification.

Plaintiff's Exhibits

1. Deposition of Clarence Uskoski, June 29, 1955.
2. Drawing of the vessel S.S. Ventura by Clarence Uskoski as a part of said deposition.
3. Picture showing vertical view of bent hatch cover with a man holding a straight board along-

side of the hatch cover to show the extent of which the hatch cover was bent.

4. Picture showing a vertical view of the bent hatch cover.

5. Picture showing horizontal view of the bent hatch cover.

6. Payroll records of Portland Stevedoring Company (and other employers) showing earnings of plaintiff during 1954 and 1953.

7. Deposition of Guy W. Swanson taken in behalf of the defendants, June 4, 1955.

8. Hospital records of St. Vincent's Hospital concerning the plaintiff while he was confined in the hospital.

9. X-rays from hospital.

10. Reports of Edward K. Kloos, M.D.

11. Reports of Howard Cherry, M.D.

12. July 20, 1955, report of E. G. Chuinard, M.D., to WBM.

13. Dr. Chuinard's X-rays.

14. Report of John Raaf, M.D., to WMB, June 15, 1955.

15. Dr. Raaf's X-rays.

16. Reserve for marine architect's drawing of hatches.

17. Statement of J. V. Lundstrom.

18. United States Life Tables, 1949-1951.

19. Dr. Berg's X-rays.

20. Dr. Berg's report.

Defendants' Exhibits

1. Photographs of hatch boards.
2. Deposition of Clarence Uskoski.
3. Statement of J. V. Lundstrom.
4. Deposition of Guy W. Swanson.
5. Contract between defendant and third party defendants.

* * *

Third Party Defendant

Independent Stevedore Company's Exhibits

1. Four photographs of hatch boards.
2. Deposition of Swanson.
3. Deposition of Uskoski.
4. Statement of Lundstrom.

* * *

Third Party Defendant

Portland Stevedoring Company's Exhibits

1. Four photographs of hatch boards.
2. Deposition of Swanson.
3. Deposition of Uskoski.
4. Statement of Lundstrom.

* * *

The foregoing is a pretrial order agreed upon between counsel and the Court, and, may be amended at the trial by consent of all parties or to prevent manifest injustice or at the discretion of the Court, and that said pretrial order supersedes the pleadings which now pass out of the case.

Dated at Portland, Oregon, this 5th day of February, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

The foregoing form of pretrial order is hereby approved:

/s/ HOWARD K. BEEBE,
Attorney for Plaintiff.

/s/ KENNETH E. ROBERTS,
Attorney for Defendants and
Third Party Plaintiffs.

/s/ ERSKINE WOOD,
Attorney for Third Party
Defendants.

Lodged November 1, 1956.

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the undersigned Judge of the above-entitled court, and the parties having introduced evidence on the merits of the controversy and all parties having rested and the court having heard arguments of counsel and having considered the written briefs submitted, the court does hereby

make the following findings of fact and conclusions of law.

Findings of Fact

I.

Matson Navigation Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

Oceanic Steamship Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

Plaintiff is a resident and inhabitant of the State of Oregon.

IV.

This action is one of a civil nature and the matter and amount in dispute herein exceeds the sum of \$3,000 exclusive of interest and costs.

V.

Plaintiff elected to pursue a remedy against a third party pursuant to the provisions of the Longshoremen & Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees' Compensation, a formal notice of election to sue.

VI.

Plaintiff was employed as a longshoreman by the Portland Stevedoring Company and on or about

the 9th day of February, 1955, while he was working on the S.S. Ventura and in the course and scope of his employment, he sustained injuries as hereinafter more specifically described when he fell into the hold of the S.S. Ventura, a vessel which was owned and operated by the Oceanic Steamship Company.

VII.

On or about February 9, 1955, the S.S. Ventura and its appliances were unseaworthy in that the metal hatch covers were bent, twisted and dished so that they would slip, roll and turn when stepped upon and said unseaworthiness was the direct and proximate cause of plaintiff's fall into the hold of said vessel and was the proximate cause of the injuries and damages sustained by plaintiff as hereinafter specifically found.

VIII.

At said time and place the defendant, Oceanic Steamship Company, was negligent and failed to furnish plaintiff a safe place to work in that:

(a) The said defendant maintained the hatch covers upon said ship in a bent, twisted, dished and unsafe condition;

(b) Said ship and its appliances were maintained in an unseaworthy condition by the said defendant in that said metal hatch covers were bent, dished and twisted so that they would slip, roll and turn when stepped upon.

(c) Said defendant was negligent in failing to provide and equip said ship with safe and stable hatch covers before having longshoremen, and particularly the plaintiff, work about and upon said hatch.

IX.

As a direct and proximate result of the unseaworthiness of said vessel and of the negligence of the defendant, Oceanic Steamship Company, as aforesaid, plaintiff was caused to fall into the hold of said ship when he stepped upon one of said defective hatch covers while engaged in the course and scope of his employment.

X.

Plaintiff was not guilty of contributory negligence.

XI.

As a direct and proximate result of the unseaworthiness of said vessel and of the negligence of the defendant, Oceanic Steamship Company, plaintiff sustained the following injuries:

(a) A severe brain injury consisting of severe and extensive, diffused cerebral contusions, with hemorrhages and concussion deep in the substance of the brain with marked cerebral edema and long lasting coma and semi-coma which required the plaintiff to undergo brain surgery on two occasions and which has caused a severe impairment of plaintiff's mental processes and a morbid personality change. Said injury is permanent and will not improve.

(b) A severe spraining and straining of the muscles, tendons and ligaments of plaintiff's spine.

Said injuries have caused the plaintiff to suffer excruciating physical and mental pain, suffering, distress, anxiety and anguish. Said permanent brain injury will cause the plaintiff to suffer severe physical and mental, suffering, distress, loss of memory, anxiety and anguish for the balance of his life.

Prior to said accident and injury plaintiff was an able-bodied man, 53 years of age, who was capable of and was earning in excess of \$5,000 per year as a longshoreman. He is untrained and unqualified for any kind of work other than physical labor and said brain injury renders it impossible for him to train himself for any type of sedentary occupation. Plaintiff is permanently and totally disabled from performing any kind of gainful work and his earning capacity has been totally destroyed.

Plaintiff, at the time of trial, had a life expectancy of between 19 and 20 years.

I find that plaintiff has been generally damaged in the sum of \$100,000.00.

XIII.

As a further direct and proximate result of the unseaworthiness of said vessel and of the negligence of the defendant, Oceanic Steamship Company, as aforesaid, the plaintiff was required to and did incur reasonable hospital and medical expenses in the sum of \$2,053.60 and has lost wages from the

date of the accident to the time of the trial in the sum of \$10,000 all to his special damage in the sum of \$12,053.60.

Conclusions of Law

I.

The Court has jurisdiction of the parties and of the subject matter.

II.

Plaintiff is entitled to a judgment against the defendant, Oceanic Steamship Company, in the sum of \$12,053.60 as special damages and for the further sum of \$100,000.00 as his general damages, as well as his costs and disbursements herein incurred.

Dated this 14th day of March, 1957.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF OCEANIC STEAMSHIP COMPANY FOR INDEMNITY OVER

The above-entitled cause having duly come on for trial before the undersigned judge of the above-

entitled Court, plaintiff appearing in person and by his attorneys, William H. Morrison and Howard K. Beebe, and the defendants being represented by their attorneys, Kenneth E. Roberts (Mautz, Souther, Spaulding, Denecke & Kinsey), and the third party defendants being represented by their attorneys, Erskine Wood (Wood, Matthiessen, Wood & Tatum), and the Court having heard evidence from their respective parties and their witnesses and having heard argument of counsel and having considered briefs submitted by counsel and being otherwise fully advised in the premises does now make and enter the following findings of fact and conclusions of law on the issue of indemnity over:

Findings of Fact

I.

That Oceanic Steamship Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California and was and now is the owner and operator of the Vessel S.S. Ventura.

II.

That heretofore on the 14th day of March, 1957, the within-entitled Court signed plaintiff's proposed findings of fact and conclusions of law awarding plaintiff \$100,000.00 general damages plus \$12,-053.60 special damages plus costs and disbursements against the defendant Oceanic Steamship Company, and that thereafter, on the day of March, 1957, and based on said findings of fact and conclusions

of law, judgment was entered against the defendant Oceanic Steamship Company in the sum of \$112,053.60 in favor of plaintiff, together with his costs and disbursements.

III.

That the Court found in plaintiff's action against Oceanic Steamship Company that the Steamship Company had breached its nondelegable duty to furnish a seaworthy vessel and that it was negligent in failing to provide the plaintiff with a safe place to work; that the said acts were of passive negligence.

IV.

That the Independent Stevedore Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and that it, a few days prior to the 9th day of February, 1955, and pursuant to contract, loaded the S.S. Ventura at Yaquina Bay, Oregon.

V.

That the Portland Stevedoring Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that on the 9th day of February, 1955, pursuant to contract, loaded the S.S. Ventura at Portland, Oregon.

VI.

That on the 9th day of February, 1955, plaintiff was a longshoreman employed by the Portland Stevedoring Company and that he was and now is

a resident and inhabitant of the State of Oregon, and that this action is of a civil nature and that the amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs.

VII.

That when the vessel was loaded by Independent Stevedore Company at Yaquina Bay, Oregon, the said Stevedore Company was negligent in replacing the No. 7 strongback of No. 3 lower 'tween deck hatch so that it protruded approximately four inches above its housing slots and that such negligence was a substantial factor in bringing about the harm to the plaintiff, and that Independent Stevedore Company was an independent contractor having sole and complete charge, control and supervision of the work, including the placement of the strongbacks and hatch covers.

VIII.

That the contract between Independent Stevedoring Company and Oceanic provided in part:

“The above rates will include the following services of the contractor:

“(a) The supplying of all necessary stevedoring labor, including winchmen, hatch tenders, and foremen, and all stevedoring direction and supervision requisite or necessary for the proper and efficient conduct and control of the work as well as any equipment and labor needed in switching cars, etc.

“(c) The removal and replacing of hatch covers, beams and strongbacks at hatches where any stevedoring work is conducted; and the rigging and unrigging of booms, guys, falls, etc., to be used in the work (initial opening and final closing).

“(e) The laying, removing and other handling of all dunnage used or intended to be used in connection with the cargo.

“Responsibilities of the Parties:

“All stevedoring work and supervision, and all other services of the contract or under this contract shall be under the sole direction and control of the contractor, providing, however, that the operator and the Master or officer in charge of the ship shall always have the right to reject the work if, in the opinion of the Master or Officer in charge of the ship, cargo is so stowed or secured as to make the ship unseaworthy or unfit for her contemplated voyage, or as to subject the crew or any of the cargo to unnecessary risk or danger. The contractor will be responsible for loss or damage to the ship, its equipment and the cargo, through or as a result of its negligence * * * The contractor will carry insurance against his liability for damage caused through his fault or negligence to the property of others, such insurance to be in the amount of not less than \$250,000.00 each accident.”

IX.

That after the vessel arrived at Portland, Oregon, on the 9th day of February, 1955, the stevedore

gang, including the plaintiff, and all employed by Portland Stevedoring Company went to work on No. 3 hold lower 'tween deck and it was anticipated that cargo was to be stowed in the wings of the said deck.

X.

That the contract between Portland Stevedoring Company and Oceanic Steamship Company provided in part:

“The stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the steamship company in all respects, and to avoid any delay, loss or damage whatsoever to the steamship company.

“Part 2—Duties of the Stevedore—The stevedore shall (a) At all times while the vessel is being worked provide not less than one general supervisor in direct charge of the work on each vessel; load and discharge cargoes, do and perform all the duties and functions usually and customarily done and performed by a stevedore; furnish all labor of every nature and description and all gear, mechanical or other equipment (except as provided in paragraph 5 of this Part 2) necessary for the most efficient loading or discharging of the vessel, and transport the same to and from the ves-

sel or the pier or terminal where the work is to be performed * * *

“General Labor and other Provisions:

“4-b. The stevedore recognizes the relation of trust and confidence established between it and the steamship company by the contract and agrees to furnish his best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable and to co-operate fully with the steamship company in furthering the latter's interest. The stevedore further agrees to furnish efficient business administration and superintendence in performing the work.

“4-c. Whenever any actual or potential labor dispute is delaying or threatening to delay the timely and efficient performance of the work the stevedore shall immediately give notice thereof to the steamship company. Such notice shall include all relevant information with respect to such dispute.

“7. As between the parties hereto stevedore shall be responsible for any and all loss, damage or injury (including death), to persons, cargo, vessels, stores, apparel or equipment * * * or other property or thing arising through the negligence or fault of the stevedore, its employees, gear or equipment and the steamship company shall be responsible for any and all such loss, damage or injury

arising through the negligence or fault of the steamship company, its employees, gear or equipment.”

XI.

That the longshore gang, including the plaintiff, refused to work on the hatch covers because they were bent, twisted and dished and would tend to slip, roll and turn when stepped upon and further that the No. 7 strongback was unsafe in that it was four inches out of its slot and raised the hatch covers at the after end of the hatch opening; that a conference was had in the hold by the longshore gang, including the plaintiff, and the gang boss and walking boss, and it was decided by the gang, the plaintiff and the gang boss and walking boss that before commencing to work, the hatch covers should be covered over with lumber and the walking boss left the hold to secure the lumber to cover the hatch covers; that the gang boss and the longshore gang, including the plaintiff, thereafter decided to switch the No. 7 strongback with the No. 1 strongback and this was done by uncovering two sections of the hatch covers at the fore end of the hatch opening and two sections of the hatch covers at the after end of the opening; that the said Portland Stevedoring Company was negligent in failing to cover the hatch covers with lumber before allowing the longshore gang, including the plaintiff, to work on them, which negligence was an active concurrent proximate cause of the accident.

XII.

That after the strongbacks had been switched the

longshore gang commenced to cover up again preparatory to laying lumber on the hatch covers and the plaintiff while in the process of replacing the hatch covers at the after end of the hatch opening stepped onto a hatch cover and he and the hatch cover were precipitated into the lower hold of the vessel; that after the accident and after all the hatch covers had been replaced the longshore gang covered the metal hatch covers with lumber and worked on the lumber surface in stowing cargo in the wings of the hold.

XIII.

That the Portland Stevedoring Company in Portland was engaged in the loading operation of the vessel and was an independent contractor having sole and complete charge, control and supervision of the work including the uncovering of the hatch opening, the switching of the strongbacks and the recovering of the hatch openings.

XIV.

That the Portland Stevedoring Company, through its supervisory agents and employees, namely, the gang boss and walking boss, had knowledge of the condition of the hatch covers prior to the injury of the plaintiff and with such knowledge had ordered and allowed the plaintiff to work on the hatch covers without warning him of the known condition of the hatch covers or exercising due care to remedy the said known condition of the hatch covers, all of which negligence was active negligence and a proximate cause of plaintiff's injury.

XV.

That the negligence of the Independent Stevedore Company and Portland Stevedoring Company, as aforesaid, was the active, concurrent and proximate cause of plaintiff's fall into the lower hold and subsequent injury.

XVI.

That the said acts of the third party defendants constituted a breach of the said third party defendants consensual obligation owing to Oceanic Steamship Company to perform the work of loading the S.S. Ventura and all work incidental thereto in a reasonably safe and proper manner.

Conclusions of Law

I.

The Court has jurisdiction of Oceanic Steamship Company and the third party defendants and of the subject matter.

II.

That the negligence of Oceanic Steamship Company was passive and that the negligence of the third party defendants and each of them was the active, concurrent and proximate cause of plaintiff's injury.

III.

That the third party defendants breached their consensual obligation owing to Oceanic Steamship Company to perform the work of loading and all work incidental thereto in a reasonably workmanlike and safe manner.

IV.

That Oceanic Steamship Company is entitled to full indemnity against the third party defendants and each of them in the sum of \$112,052.60 together with costs.

Dated this day of, 1957.

.....,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged March 22, 1957.

[Title of District Court and Cause.]

PROPOSED JUDGMENT

This cause having come on for trial before the undersigned Judge of the above-entitled Court, and the Court having entered judgment in favor of the plaintiff and against the defendant Oceanic Steamship Company and Oceanic Steamship Company having sought full and complete indemnity from the third party defendants and the Court having heard the evidence of the respective parties and their witnesses and having heard argument of counsel and being otherwise fully advised in the premises, and having heretofore made and entered its findings of fact and conclusions of law on the issues of indemnity over, it is now

Considered, Ordered, Adjudged and Decreed that Oceanic Steamship Company be and is hereby

awarded full indemnity against the third party defendants and each of them in the sum of \$112,053.60 together with its costs and disbursements incurred herein.

Dated this day of, 1957.

.....,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged March 22, 1957.

[Title of District Court and Cause.]

THIRD-PARTY DEFENDANTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the undersigned Judge of the above-entitled Court, and the plaintiff and defendants having introduced evidence, and the third-party defendants having participated in the trial, and all parties having rested, and the Court having heard arguments of counsel and having considered the written briefs submitted, and the Court having made its findings of fact and conclusions of law, and entered judgment on the issues between plaintiff and defendants, now, on the issues between the third-party plaintiffs and the third-party defendants, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Matson Navigation Company at all times pertinent to this proceeding was and now is a corporation duly organized and existing under the laws of the State of California.

II.

Oceanic Steamship Company at all times pertinent to this proceeding was and now is a corporation duly organized and existing under the laws of the State of California.

III.

Plaintiff is a resident and inhabitant of the State of Oregon.

IV.

The third-party defendants were at all times and now are corporations organized and existing under the laws of the State of Oregon.

V.

In this proceeding plaintiff has recovered a judgment against defendant Oceanic Steamship Company in the sum of \$112,053.60, together with his costs and disbursements, and said third-party plaintiff seeks recovery of this sum from one or both of said third-party defendants by way of indemnity.

VI.

While the steamship Ventura, owned by defendant Oceanic Steamship Company, was at Yaquina

Bay, Oregon, third-party defendant Independent Stevedore Company, as a stevedore contractor, covered up No. 3 lower 'tween deck hatch, and in doing so left the No. 7 strongback protruding slightly above the level of the other strongbacks because it would not sink completely into its sockets, with the result that the ends of the hatch covers, where they rested on this strongback, were slightly elevated.

VII.

When the vessel, a short time after, arrived at Portland, third-party defendant Portland Stevedoring Company, as a stevedore contractor, was going to load lumber in this No. 3 'tween deck, which necessitated the longshoremen walking over and working upon this hatch.

VIII.

The hatch covers for this hatch were of metal and were warped, dished, bent, defective and unseaworthy. In view of this condition the hatch boss and longshoremen of Portland Stevedoring Company determined to "floor off" the hatch by leaving the hatch covers in place, but laying lumber over them as a floor, covering the whole hatch, to make it a safer place upon which to work, and to facilitate this, and make the whole thing level, they removed the protruding No. 7 strongback from its sockets and exchanged it with No. 1 strongback. As a result of this exchange these two strongbacks were firmly and completely sunk into their sockets, and all the strongbacks were now even, alike and level.

IX.

The longshoremen then, preparatory to flooring off the hatch with lumber, proceeded to replace those hatch covers, which it had been necessary to remove, in order to exchange the two strongbacks. This work of replacing the hatch covers was merely the normal, routine work of covering up the hatch by placing the hatch covers on the strongbacks, which were now perfectly in place. It was while doing this that plaintiff Swanson, because of the aforesaid defective and unseaworthy condition of the hatch covers, and without any fault on the part of third-party defendants, fell into the hold and was injured.

X.

The plan to floor off the hatch with lumber had been concurred in by the ship's supercargo, who cooperated with the hatch boss of Portland Stevedoring Company in furnishing lumber for that purpose, and said plan was later carried out.

XI.

Third-party defendant Independent Stevedore Company was not negligent and did not breach its stevedoring contract because of the manner in which it set the strongbacks and covered up the hatch at Yaquina Bay, or at all, and its acts in that regard were not a proximate cause of plaintiff's injuries, nor can it be supposed that they were within the contemplation of the parties when said stevedoring contract was made.

XII.

Third-party defendant Portland Stevedoring Company was not negligent, nor did it breach its stevedoring contract in any particular, by or because of the manner in which it did the work at No. 3 'tween deck hatch, as aforesaid, nor in respect of any of those facts, things or circumstances which caused plaintiff's injuries, or at all.

XIII.

The said defective hatch covers were tendered to Portland Stevedoring Company by Oceanic Steamship Company, and the Stevedoring Company was invited by the Steamship Company to use them as they were. There was no duty on the Stevedoring Company to point out to the ship the defects in the hatch covers, and the Stevedore Company, in flooring off the hatch, as aforesaid, was making the hatch a safer place upon which to work.

XIV.

The said hatch covers were unseaworthy as aforesaid, and the third-party plaintiff's were negligent in permitting and allowing them to become in such condition, and in failing to provide good and sufficient hatch covers. Third-party plaintiffs and the ship's officers knew of this condition.

XV.

The sole and proximate cause of the injuries to plaintiff Swanson was the said defective and unseaworthy condition of the hatch covers and the negli-

gence aforesaid, and his injuries are in no way attributable to either of the stevedore companies.

Conclusions of Law

The Court concludes that the third-party plaintiffs should take nothing from third-party defendants, or either of them, by way of indemnity or contribution, and that judgment should be entered in favor of third-party defendants and against third-party plaintiffs, with costs and disbursements to said third-party defendants.

The Court expressly determines that the aforesaid separate judgment may be entered and that there is no just reason for delay, and expressly directs the entry of said judgment.

Dated March 27, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

Service of copy acknowledged.

[Endorsed]: Filed March 27, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8074

GUY W. SWANSON,

Plaintiff,

vs.

MATSON NAVIGATION COMPANY and
OCEANIC STEAMSHIP COMPANY,

Defendants and Third-Party Plaintiffs,

vs.

INDEPENDENT STEVEDORE COMPANY,
a Corporation, and PORTLAND STEVE-
DORING COMPANY, a Corporation,

Third-Party Defendants.

JUDGMENT

The above-entitled cause having come on regularly for trial without a jury before the undersigned judge of the above-entitled court. Plaintiff appeared in person and by W. H. Morrison and Howard K. Beebe, his attorneys, defendants appeared by Kenneth Roberts their attorney and the third-party defendants appeared by Erskine Wood of their attorneys. The respective parties introduced evidence upon the issues raised by the pretrial order and their counsel argued the law and the facts orally and by briefs. The court having considered the evidence, arguments and briefs, and

having made its Findings of Fact and Conclusions of Law in favor of the plaintiff and against the defendant, Oceanic Steamship Company, but not yet having determined the issue between the said defendants and the third party defendants and it appearing to the court that there is no just reason for delay in entering judgment herein in favor of the plaintiff and against the defendant, Oceanic Steamship Company,

Now, Therefore, based upon the said Findings of Fact and Conclusions of Law made and heretofore entered herein,

It Hereby Is Considered, Ordered and Adjudged that plaintiff recover of and from the defendant, Oceanic Steamship Company, the sum of \$112,053.60 together with his costs and disbursements herein incurred; and

It Is Further Ordered that plaintiff take nothing from defendant, Matson Navigation Company.

Dated this 27th day of March, 1957.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed March 27, 1957.

In the United States District Court
for the District of Oregon

No. Civil 8074

GUY W. SWANSON,

Plaintiff,

vs.

MATSON NAVIGATION COMPANY and
OCEANIC STEAMSHIP COMPANY,

Defendants and Third-Party Plaintiffs,

vs.

INDEPENDENT STEVEDORE COMPANY,
a Corporation, and PORTLAND STEVE-
DORING COMPANY, a Corporation,

Third-Party Defendants.

JUDGMENT

This cause having been fully tried before the undersigned judge, and the Court having entered its judgment in favor of plaintiff and against defendant Oceanic Steamship Company, and the third-party plaintiffs having sought indemnity from the third-party defendants, and the Court having made and filed Findings of Fact and Conclusions of Law, on the issues between third-party plaintiffs and third-party defendants, and having determined that this separate judgment may be entered, it is now

Considered, Ordered and Adjudged that the third-party plaintiffs be non-suited as to the third-party

defendants, and recover nothing from said third-party defendants, or either of them, and that said third-party defendants have and recover their costs and disbursements from third-party plaintiffs, taxed at \$40.00.

Dated March 27th, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

Civil No. 8074

NOTICE OF APPEAL

To: Guy W. Swanson and to his attorney W. H. Morrison (Maguire, Shields, Morrison & Bailey) and to Independent Stevedore Company and Portland Stevedoring Company, and to Erskine Wood (Wood, Matthiessen, Wood & Tatum), their attorneys:

Notice is hereby given that Oceanic Steamship Company, a corporation, defendant and third-party plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgments entered in this case on the 27th day of March, 1957, which are as follows:

“Now, Therefore, based upon the said Findings of Fact and Conclusions of Law made heretofore and entered herein,

“It Is Hereby Considered, Ordered and Adjudged that plaintiff recover of and from the defendant, Oceanic Steamship Company, the sum of \$112,053.60, together with his costs and disbursements herein incurred;”

“* * * it is now

“Considered, Ordered and Adjudged that the third-party plaintiffs be nonsuited as to the third-party defendants, and recover nothing from said third-party defendants, or either of them, and that said third-party defendants have and recover their costs and disbursements from third-party plaintiffs, taxed at \$.”

Dated this 21st day of May, 1957.

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ ARVIN H. DENECKE,

Attorneys for Oceanic Steamship Company, Defendant and Third-Party Plaintiff.

[Endorsed]: Filed May 21, 1957,

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents, That Oceanic Steamship Company, defendant and third party plaintiff, as principal, and Federal Insurance Company, a corporation, as surety, are held and firmly bound unto Guy W. Swanson, plaintiff; Independent Stevedore Company, a corporation, and Portland Stevedoring Company, a corporation, third party defendants, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid the said Guy W. Swanson, Independent Stevedore Company and Portland Stevedoring Company, or their assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of May, 1957.

Whereas, on the 27th day of March, 1957, in the United States District Court for the District of Oregon, in an action pending in said Court between said defendant and third party plaintiff and the said plaintiff and third party defendants, there was rendered a judgment for said plaintiff and for said third party defendants and against defendant and third party plaintiff and for the said plaintiff's and third party defendants' costs herein incurred, the said defendant and third party plaintiff having filed in said Court a notice of appeal to reverse the judgment in the aforesaid action by appeal to the

United States Court of Appeals for the Ninth Circuit.

Now, the condition of the above obligation is such that if said defendant and third party plaintiff shall pay the costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if judgment is modified, then the above obligation to be void; or else to remain in full force and effect.

OCEANIC STEAMSHIP COMPANY,

By /s/ ARVIN H. DENECKE,
Of Its Attorneys, Principal.

[Seal] FEDERAL INSURANCE COMPANY.

By /s/ E. STEWART,
Attorney-in-Fact, Surety.

Countersigned:

DOOLY & CO.

By /s/ R. M. DOOLY,
Partner, Oregon Resident
Agent.

[Endorsed]: Filed May 21, 1957.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard *ex parte* this day upon motion of Oceanic Steamship Company, through its attorneys, Mautz, Souther, Spaulding, Denecke & Kinsey (Kenneth E. Roberts), for an order extending the time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable Oceanic Steamship Company to have additional time to consider the said appeal, and the Court being fully advised in the premises,

It Is Hereby Ordered that the time for filing the within appeal and docketing the action be and is hereby extended to ninety days from the first date of the notice of appeal.

Dated this 23rd day of May, 1957, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 23, 1957.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It is hereby stipulated between Oceanic Steamship Company, a corporation, defendant and third party plaintiff, and Independent Stevedore Com-

pany, a corporation, and Portland Stevedoring Company, a corporation, third party defendants, through their respective attorneys, that the complete record and all the proceedings and evidence in the within-entitled action are hereby designated for inclusion in the record on appeal.

Dated this 20th day of May, 1957.

WOOD, MATTHIESSEN, WOOD
& TATUM,

By /s/ ERSKINE WOOD,
Attorneys for Third Party Defendants, Independent
Stevedore Company and Portland Stevedoring
Company.

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ KENNETH E. ROBERTS,
Attorneys for Defendant and Third Party Plaintiff
Oceanic Steamship Company.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed between the undersigned attorneys for the defendant and third party plaintiff Oceanic Steamship Company, and third party defendants, Independent Stevedore Company and Portland Stevedoring Company, that the orig-

inal copies of all the exhibits introduced in the within cause be sent to the Clerk of the United States Court of Appeals for the Ninth Circuit, in lieu of copies thereof.

Dated this 20th day of May, 1957.

WOOD, MATTHIESSEN, WOOD
& TATUM,

By /s/ ERSKINE WOOD,
Attorneys for Third Party Defendants, Independent
Stevedore Company and Portland Stevedoring
Company.

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ KENNETH E. ROBERTS,
Attorneys for Defendant and Third Party Plaintiff
Oceanic Steamship Company.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard upon the motion of Oceanic Steamship Company, through its attorneys, Mautz, Souther, Spaulding, Denecke & Kinsey (Kenneth E. Roberts), for an order directing the Clerk of the above-entitled Court to transmit in the original form all the exhibits introduced in the within cause to the Clerk of the United States

Court of Appeals for the Ninth Circuit, and it appearing to the Court that the parties through their respective attorneys, have so stipulated, and the Court being advised in the premises, it is hereby

Ordered that the Clerk of the above-entitled Court transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, in their original form, all exhibits introduced in the trial of the above-entitled cause.

Dated at Portland, Oregon, this 10th day of June, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant respectfully submits the following statement of points on which appellant intends to rely on appeal pursuant to Rule 17(6).

1. The Trial Court erred in finding and concluding that the Oceanic Steamship Company was negligent in permitting and allowing the hatch covers to become unseaworthy and in failing to pro-

vide good and sufficient hatch covers and that the appellant, Oceanic Steamship Company, and the ship's officers knew of the condition of the hatch covers and that this was a proximate cause of the plaintiff's injuries.

2. The Trial Court erred in finding and concluding that the appellee Stevedoring Companies were not negligent in any way and that the sole proximate cause of the injuries to the plaintiff was the defective and unseaworthy condition of the hatch covers and the negligence of the appellant, Oceanic Steamship Company, and the ship's officers.

3. The Trial Court erred in not finding that the unseaworthy condition of the vessel was merely a passive condition and that Oceanic Steamship Company and the ship's officers were not negligent.

4. The Trial Court erred in not finding that the active negligence of the appellee Stevedoring Companies was the proximate cause of plaintiff's injuries.

5. The Trial Court erred in not finding that the appellee Stevedoring Companies failed to discharge their obligations or refrain from doing work on the vessel, or using any part of the vessel negligently or in any manner which would foreseeably impose liability upon the vessel and the appellant, Oceanic Steamship Company.

6. The Trial Court erred in not finding that the appellee Stevedoring Companies breached their con-

sensual obligation to the appellant, Oceanic Steamship Company, to perform the work of loading and all work incidental thereto in a reasonably workmanlike and safe manner.

7. The Trial Court erred in not entering a judgment as proposed by the appellant, Oceanic Steamship Company, allowing full indemnity against appellee Stevedoring Companies or either of them.

8. The Trial Court erred in entering judgment dismissing appellant Oceanic's third party complaint against the appellee Stevedoring Companies or either of them.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ KENNETH E. ROBERTS,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1957.

United States District Court,
District of Oregon

Civil No. 8074

GUY W. SWANSON,

Plaintiff,

vs.

MATSON NAVIGATION COMPANY, a Corpora-
tion, and OCEANIC STEAMSHIP COM-
PANY, a Corporation,

Defendants and Third-Party Plaintiffs,

vs.

INDEPENDANT STEVEDORING COMPANY,
a Corporation, and PORTLAND STEVEDOR-
ING COMPANY, a Corporation,

Third Party Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Claude McColloch,
U. S. District Judge.

Appearances:

WILLIAM MORRISON and
HOWARD BEEBE,
Attorneys for Plaintiff.

KENNETH ROBERTS,
Attorney for Matson Navigation Company.

ERSKINE WOOD,
Attorney for Third Party Defendants.

February 5, 1957—10:10 A.M.

(Whereupon, opening statements were made by counsel but not transcribed.)

(Whereupon, Plaintiff's Exhibits 1, 4, 5, and 6-A through 6-R were marked for identification.)

The Court: Call your witness.

Mr. Morrison: Call Mr. Uskoski.

CLARENCE USKOSKI

produced as a witness on behalf of the plaintiff and having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. Mr. Uskoski, where do you live?

A. In Vancouver, Washington.

Q. Vancouver, Washington. Are you a married man?

A. Yes.

Q. And what line of work do you follow?

A. Longshoring.

Q. How long have you worked at longshoring, as a longshoreman?

A. Since '49.

Q. And were you present on the morning of this accident? [2*]

A. Yes, sir.

Q. Who was your partner that morning?

A. Guy Swanson.

Q. That's the plaintiff in this case?

(Testimony of Clarence Uskoski.)

A. Yes, sir.

Q. Do you recall approximately what time you reported for work that day?

A. We started work at 8:00 o'clock.

Q. You started work at 8:00 o'clock?

A. Yes.

Q. Was that your first day on this particular work? A. Yes.

Q. And what type of work were you going to do?

A. We were going to load lumber.

Q. Load lumber. Now, about what time did the accident happen?

A. Approximately between 9:30 and 10:00, that's as close as I can give.

Q. As close as you can give, and on what deck was that? A. Lower 'tween deck.

Q. Now, will you just state—or, what did you do after you reported there?

A. Well, we—first of all we rigged up the ship's gear to go down in the lower hold, to go in the hold we uncovered the top deck and I believe we uncovered a shelter deck on [3] the upper 'tween deck and then we went to the lower 'tween deck.

Q. And what did you—you mentioned—there was mentioned here a king beam. What was the condition of the king beam in the lower 'tween deck when you arrived there?

A. Well, when we went to the lower 'tween deck, of course, we right away noticed this first beam was way up high.

Q. And what was done about that?

(Testimony of Clarence Uskoski.)

A. Well, we held a discussion and it seemed unsafe to work on, so——

Q. What did you do about it?

A. Well, we measured the other beams to see if there was any beam shorter than that one, so we could exchange, and we found that the forward beam was a little shorter, so we proceeded to exchange the two, the two beams.

Q. You changed the aft beam with the forward beam?

A. That's right, sir.

Q. And were these hatch—what kind of hatch covers did this have there?

A. Metal hatch covers.

Q. What—about what are the dimensions of these hatch covers?

A. I'd say roughly two feet wide and close to four feet long.

Q. About what is the weight of one of these hatch covers? [4]

A. It would be a rough guess, 25 to 30 pounds.

Q. And what are they made up of?

A. Some kind of metal, I couldn't say, sir.

Q. Some kind of metal, and were you replacing these hatch covers when this accident occurred?

A. We had exchanged the beams and were putting the hatch covers back on and the accident happened.

Q. When the accident happened and you—how many of you were carrying this hatch cover?

A. I was on one end and Guy Swanson was on the other end.

(Testimony of Clarence Uskoski.)

Q. And would you tell the Court what happened?

A. Well, when we was putting—we had three hatch covers, I believe, on the first section—we was putting the third one on the second section and when he stepped on one of those hatch covers it gave way on him and he slipped forward and fell in the hatch.

Q. You mean the hatch cover slipped forward?

A. Well, it give way on him.

Q. Gave way on him? A. Yes.

Q. And what happened to the hatch cover?

A. It fell in the lower hold.

Q. And what happened to the hatch cover that you were carrying?

A. That went with him. [5]

Q. And where did Swanson end up?

A. In the lower hold.

Q. Could you see those two hatch covers down below there? A. Yes, they were down there.

Q. Now, what were the conditions of these two hatch covers?

A. Just like the rest of them, pretty badly bowed.

Q. Pretty badly bowed? A. Yes, cupped.

Q. Cupped? A. Yes.

Q. And what was Mr. Swanson's condition as to whether or not he was conscious or unconscious at that time?

A. He was unconscious, breathing heavy and gasping for air. He was definitely out.

Q. And was he still unconscious when he was taken away from there? A. Yes.

(Testimony of Clarence Uskoski.)

Q. Now, were these—were these two hatch covers later moved?

A. Yes, they was brought up to the 'tween deck.

Q. To the 'tween deck? A. Yes.

Q. And do you recall how they were put up there?

A. I don't recall, but one of the guys put them in the aft trunk of the ship because we didn't want to use them [6] over again.

Q. I mean, how were they handed—were you present when they were handed up, that is what I am asking?

A. I recall one of the men passing them up and I believe I handed one of them myself. I ain't too clear on that.

Q. You are not too clear on that? A. No.

Q. You do have some recollection of them being handed up? A. Yes.

Q. How long had you worked with Swanson prior to this?

A. Oh, several jobs, I liked to work with Swanson as often as I could.

Q. What kind of a worker was he?

A. A fine worker.

Q. And what was the——

The Court: Is the plaintiff here?

Mr. Morrison: Yes, your Honor.

The Court: Which man is he?

Mr. Morrison: The gentleman right here on the end.

(Testimony of Clarence Uskoski.)

Q. What type of a person was he before that; was he a jovial person or a morose sort of person?

A. Well, he was a happy-go-lucky guy, never complained much of anything.

Q. Did you know of him being sick or anything before this [7] accident? A. No.

Q. Have you had occasion to see him since this accident?

A. Once, because I was in the hospital myself.

Q. Up in the hospital? A. Yes, uh-huh.

Q. But you haven't seen him since then, so you know nothing of his condition at the present time?

A. No.

Q. What was the condition of his health before the accident, general health; was he robust?

A. He was a pretty hefty guy, I mean, pretty husky I should say.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Mr. Uskoski, was Mr. Swanson present when you first started uncovering this number 3 hatch?

A. Yes.

Q. He was a member of the gang, was he?

A. Yes.

Q. I assume that you used the ship's equipment to uncover the hatch; is that right?

A. That's right.

Q. And then you got down to the lower 'tween

(Testimony of Clarence Uskoski.)

deck and [8] you saw this condition; is that correct? A. That's right.

Q. Now, what did you do then when you saw the condition, and by that, I mean not only yourself but the gang; did you have a conference of some sort?

A. Yes, we had quite a discussion.

Q. And who was the leader in that discussion, the gang boss or the steward or all of you?

A. Well, we all put in our two-bits worth.

Q. I see. And did the walking boss come down?

A. Yes, he was down there.

Q. He was down there and you discussed it generally amongst yourselves; is that correct?

A. Yes.

Q. And what was it that you were objecting to about the condition of the hatch covers?

A. Because the beam was not settled in place and the hatch covers were rised up in the middle on that uncertain beam.

Q. I see, sort of a peak in the after side?

A. That's right.

Mr. Roberts: Your Honor, this is a little confusing as to how the accident happened. I wonder if you would just excuse me for a moment, while I make a rough diagram of it.

Q. Now, before—no, before you go, I'd like to ask you [9] a few more questions about the gang steward. What does he do, is he in charge of the safety? A. The steward?

Q. Yes.

(Testimony of Clarence Uskoski.)

A. I don't recall whether the gang had a steward or not at the time.

Q. And who was the gang boss?

A. Vic Luns—I can't remember his name.

Q. Mr. Lundstrom? A. Yes.

Q. I see. Who was it that actually gave the order to switch the aft and forward beams, strongbacks?

A. I think the gang boss agreed with us that it was best to move it, to switch the beams.

Q. Now, in this discussion when the walking boss was down there, he told you that he was going to get some dunnage or wood to cover up the hatch openings? A. He mentioned it, yes.

Q. And to put it across the entire hatch; is that correct? A. That's right.

Q. You were going to load lumber into that hatch and stow it into the wings; is that correct?

A. That's correct.

Q. What kind of a ship is this, by the way, was it a C-2 or -3? [10] A. I believe a C-2.

Q. And these ships, have you worked on them before, Mr. Uskoski?

A. On that certain type, I don't know whether it was that particular ship.

Q. Do those ships come equipped with steel hatch covers?

A. I think that certain line does, yes.

Q. I see. And when you went down into this number 3 'tween deck, in addition to this controversy or discussion you had about the strongback,

(Testimony of Clarence Uskoski.)

was there any discussion about the general nature and the condition of the hatch boards or the hatch covers themselves?

A. Yes, because we always come down on those steel hatch covers there, it's kind of a dangerous deal.

Q. What did you discuss; what was the nature of the discussion, that they were cupped or dished or bowed or what?

A. That they were bowed where loads had landed on them.

Q. So in talking to the gang boss you also discussed the condition of the hatch-board covers themselves; is that correct?

A. That's correct.

Q. And it was eventually decided that you would cover them with wood; is that correct?

A. That's correct.

Q. When the forward and aft beams were switched was the [11] walking boss——

Mr. Wood: It wasn't fore and aft, it was athwartship; weren't those beams athwartship; which way were they?

The Witness: Well, forward-and-aft beams mean they were——

Mr. Wood: But they were athwartship?

The Witness: Oh, yes.

Mr. Roberts: Well, what I mean, the front beam was switched with the back beam?

The Witness: Yes.

The Court: What was he going to cover with lumber?

(Testimony of Clarence Uskoski.)

Mr. Wood: Yes, what were you going to cover with lumber?

The Witness: Well, the hatch covers were pretty wobbly and shaky, so we figured maybe we would lay dunnage on there or lumber, and it would be safer to walk on.

The Court: On what?

The Witness: On the hatch covers.

Q. (By Mr. Roberts): On the hatch covers themselves? A. Yes.

Q. Was the walking boss in the hold when you decided to switch the beams?

A. I don't recall him being in the hold.

Q. Mr. Uskoski, do you know what the dimension is of the lip on the crossbeam that the hatch board lays on? [12]

A. I would say roughly about three inches.

Q. How about the raised part of it?

A. It's the thickness of a hatch.

Q. What would that be, about two or three inches?

A. No, an inch and a half, I'd say.

Q. Now, you say before moving the beams, somebody measured them, did you say somebody measured them? A. Yes.

Q. Who was that, do you know?

A. Well, I think a lot of us partook in that.

Q. What?

A. Quite a few of us guys partook in that.

Q. And you eventually decided that one was smaller than the other; is that it?

(Testimony of Clarence Uskoski.)

A. That's right.

Q. Do you know whether these beams are, in fact, interchangeable or can you use the beam in any slot there?

A. Most of your ships you can, but sometimes they might be a little shorter.

Q. Do you know in this particular instance whether you could?

A. It worked this time, yes.

Q. What? A. It worked this time.

Q. What I am trying to get from you, Mr. Uskoski, do you [13] know whether the beam that was in the forward part of the hatch opening was designated for that particular slot?

A. I couldn't say.

Q. Could you have used it anywhere in that hatch opening? A. The forward beam?

Q. Yes.

A. I couldn't say, maybe it wouldn't have fit another one.

Q. These hatch boards, how do they get bent and twisted and broken?

A. Oh, I think it's primarily due to the cause of landing loads on them.

Q. In the general course of the stevedoring operation and loading and unloading ship; is that correct?

A. That's correct.

Q. Do you know if anyone from the stevedoring gang reported this dissatisfaction with the board to any of the ship's officers?

A. Would you repeat that?

Q. Would you know whether anybody, one of the

(Testimony of Clarence Uskoski.)

stevedoring gang in that number 3 hold, reported any dissatisfaction with the hatch covers to any of the ship's officers?

A. I don't—I couldn't say.

Q. Now, why don't you come down so that the Court may get a clearer picture of this hatch. Draw an ordinary hatch opening? [14]

A. You want me to draw the general line?

Q. Yes, just the general line.

A. I ain't a very good artist.

Q. That's O.K. Now, just put the front part of the ship with an arrow? A. O.K.

Q. Now, as I understand it you say you switched the forward beam. Now, put where you mean the forward beam was?

A. I will just put it in the beams here (indicating).

Q. O.K. Now, show me where you switched the beam for the one that was farthest from the arrow?

A. I'll just make it two.

The Court: What are those four things there?

The Witness: Those are beams, your Honor.

The Court: What is the size of them?

Mr. Roberts: The hatch opening, your Honor, is about—how many feet would you say?

The Witness: 20 feet wide.

Mr. Roberts: You have to use the winch to switch them?

The Witness: Yes.

Mr. Roberts: The crossbeams that the hatch board rests on are made of steel?

(Testimony of Clarence Uskoski.)

The Court: Heavy steel?

Mr. Roberts: The hatch board rests on top of these beams—— [15]

The Court: They are steel beams then?

Mr. Roberts: Pardon, your Honor?

The Court: They are steel beams?

Mr. Roberts: That's right.

Q. Now, Mr. Uskoski, you were not going to work in the lower hold; is that right?

A. No, not at that time.

Q. You were going to load lumber into the 'tween deck or shelter deck? A. That's right.

Q. And you had to use this hatch opening in order to load that lumber; is that correct?

A. That's correct.

Q. Now, when you switched the forward-and-aft beam, what board did you take off?

A. We uncovered these two sections here (indicating).

Q. Now, why don't you put a cross in that section, the two you were taking off. Now, how about the forward part?

A. We had to do the same thing there.

Q. You didn't completely uncover the entire hold? A. No.

Q. Just the two sections involved in the forward-and-aft beam; is that correct?

A. That's right.

Q. Now, and then you—after you switched the beams you [16] replaced the hatch boards; is that correct? A. That's right.

Q. Now, where were you and the crew working;

(Testimony of Clarence Uskoski.)

were you working in the forward end of the hatch or after? A. I was working on the after end.

Q. You were working in the after end, and who was with you? A. Guy Swanson.

Q. O.K. Now, was there any other longshoreman covering up with you two?

A. No, not in this particular spot, no.

Q. Do the two of you cover the entire hatch there? A. Up to the middle.

Q. And who does the other end?

A. The other men.

Q. Two men on the other side?

A. Two men on each side of the tip, and these are the dividing lines (indicating).

Q. I see. Now, who took the boards off in the first place, the hatch covers, before you switched the beams?

A. I couldn't say, because I think we all had a part in that.

Q. All the men in the gang? A. Yes.

Q. And do you know where you placed those boards? [17]

A. We laid them in the wing, three feet from the coaming.

Q. In the area of the coaming? A. Yes.

Q. This coaming, by the way, isn't an abrupt slope, it slopes up, doesn't it?

A. It's got a little gradual uprising.

Q. From the flatness of the deck itself?

A. Uh-huh.

(Testimony of Clarence Uskoski.)

Q. So you, after you switched the beams, then did you use the same boards to cover it up again?

A. Yes, I think so.

Q. O.K. Now, will you tell the Court what you and Mr. Uskoski——

A. Mr. Swanson.

Q. ——Mr. Swanson covering up that corner——

A. What we done?

Q. Yes.

A. This I ain't too sure about it, how many covers we put up, but I know——

Q. Now, before you go there, Mr. Uskoski, how about the second section there, how about that section?

A. What about that section?

Q. Well, had you started covering that up?

A. No, we covered the two together.

Q. Would you tell the Court and me also, if you would, [18] how you do that?

A. This hatch cover rests on that beam, it has a little rise in the middle with a little ledge that the hatch cover rests on.

Q. You say that ledge is about three inches?

A. Yes. First, we put this hatch cover on (indicating), then we went over and put one here (indicating).

Q. Now, how did you put that on?

A. Well, we picked it up, one from each corner and lay it down, reach over and lay it down.

Q. And you reach over from the bottom part to lay it onto the ledge?

A. No, they got a handle on the top.

Q. Oh, a handle on each corner?

(Testimony of Clarence Uskoski.)

A. Countersunk handle.

Q. O.K. So you have these two covers in, then what did you do with the next two?

A. Well, then we put one here—I don't know if this was three here or two here (indicating) but we will just say there was two on here——

Q. Say you had four on there altogether?

A. No, this wouldn't be—there would be three on altogether, we will say.

Q. O.K.

A. And then from here (indicating) we are carrying hatch [19] covers, Mr. Swanson was leading the way and he stepped on this one (indicating) or either this one (indicating); if there was three here, it would have been this one (indicating). We were walking over to put one on here (indicating) and one of these two gave way on him.

Q. Where were you?

A. I was following him up, he was leading the way, I was on the solid deck.

Q. I am still a little confused. The board that Mr. Swanson was carrying was going on the inside of the——

A. I believe that's right.

Q. Are you certain about that?

A. Yes, because we alternate them for safety, so we don't have to reach too far.

Q. Well, wouldn't it be more probable that you would put in the inside one next?

A. We had the hatch boards—we were carrying them from here (indicating) from this angle, so that's really the closest one, that would be first.

(Testimony of Clarence Uskoski.)

Q. Well, put a number 1 where you put the first one. Now, number 2, number 3, number 4—so you put in 3 before you put 4 in; is that correct?

A. That's right.

Q. O.K. Now, how would you place number 4?

A. We walk from this angle (indicating), he'd be on this [20] and I'd be up here (indicating), see; I have the first handle and he has the closest handle.

Q. I see. And what happened then?

A. Well, then we went to get another one, and a lot of the time it varies, you know, under the conditions——

Mr. Wood: May I ask you, please, I don't know, how do you place number 4, were you on the outside of the edge?

The Witness: I am walking on here (indicating).

Mr. Wood: You are on number 3?

The Witness: Yes.

Mr. Wood: And where would Mr. Swanson be?

The Witness: He would be walking down here, see (indicating)?

Mr. Wood: On number 5?

The Witness: On number 2.

Mr. Wood: On number 2?

The Witness: Yes, we put one in on each side, and then we was carrying another one, we was in the process of taking it to put it in place at the time he stepped on that first cover or second cover.

Q. (By Mr. Roberts). So, to the best of your recollection, the cover that you were going to replace was number 4; is that correct? A. Yes.

(Testimony of Clarence Uskoski.)

Q. And it was number 3 that slipped away; is that correct? [21] A. Yes.

Q. And it was number 3 that slipped away; is that correct?

A. Number 3 or 1, I don't know which one.

Q. You would be walking toward the front end of the ship, wouldn't you?

A. That's right, it happened that the hatch covers happened to be in here (indicating) on this corner that we laid them down.

Q. You don't actually know what that number 3 cover did, do you, under Mr. Swanson's feet?

A. No, it happened so fast.

Q. You don't know whether that hatch cover was either on the ledge or up on the flange, do you?

A. Oh, it was—in the beginning it was on the ledge all right, because when we put them in place, we always——

Q. You know the ledge, and then you have this piece that sticks up in the middle of your beam?

A. Yes.

Q. It wasn't on top of that, do you know?

A. No.

Q. You don't know?

A. I know, because we placed them in the slot.

Q. You are certain you placed them in the right slot?

A. We had been around there too long to put them in the wrong place. [22]

Q. You don't know whether it was on top or not, what do you mean placed them in the slot?

(Testimony of Clarence Uskoski.)

A. Well, they're supposed to fit on those lips or ledges.

Q. Is there any lip on the outside of the edge of the hatch coaming? A. Yes.

Q. Where is that, what size is that?

A. It should be the same size.

Q. About three inches? A. Yes.

Q. Now, let me get this straight. At the time you and Mr. Swanson were carrying the hatch cover, you were walking around the aft end of the hatch coaming toward the front end of the ship?

A. More cater-cornered from in here (indicating). In this area, actually, how we were walking is pretty hard to say.

Q. When Mr. Swanson went into the lower hold, where were you standing?

A. Approximately out here (indicating) on this coaming here (indicating).

Q. You weren't on the hatch cover——

A. No.

Q. ——is that correct? A. No. [23]

Q. And you let go of your end of the hatch cover?

A. I must have, yes.

Q. Did that fall in the hold with him?

A. Yes.

Q. Which way did he fall or do you know?

A. I believe when this gave way he was in forward motion, I think he fell across this beam and hit his head on this (indicating). That just flashed in my mind.

(Testimony of Clarence Uskoski.)

Q. You don't know, are you telling it, or do you know that he fell across that edge and hit his head?

A. That's the way it flashed in my mind, it happened so fast it's pretty hard to tell.

Q. Will you take the witness stand again, Mr. Uskoski?

The Court: We will take a few minutes' recess.

(A short recess.)

Mr. Roberts: I won't be much longer, Mr. Uskoski. Looking at this diagram again, you think you may have placed the third hatch cover and you were in the process of going to place the fourth; is that correct?

A. That's closest to my recollection.

Q. And that was—it was the third one that went down in the hold in addition to the one you were carrying?

A. That's right, my figures might be a little haywire, we may have had three on there instead of two.

Q. It's something, either two or three on the first line? [24]

A. That's right.

Q. Now, and Mr. Swanson, when he went into the hold, fell across that beam that you had just replaced; is that correct?

A. I wouldn't swear on that, but that's my vision, I mean, I just got a glimpse of it, it happened so fast.

Q. Do you know what happened, assuming that number 3 board was the one that went into the hold, do you know what happened to that, did it go down

(Testimony of Clarence Uskoski.)

all right? A. I couldn't say.

Q. You don't know? A. No.

Q. Do you know what the position was before Mr. Swanson stepped on it?

A. I assume it was in its place as we put it in.

Q. You don't know, though, do you?

A. No, because you don't watch every——

Q. Are these hatch covers interlocking?

A. Interlocking?

Q. Yes. A. No.

Q. Do you know, Mr. Uskoski, whether the hatch covers at the forward part of the hatch opening are bigger size or smaller size than the ones you were replacing at the after end?

A. I didn't get that question.

Q. Well, are all the hatch covers in this particular [25] hatch opening the same size?

A. I believe they are standard size.

Q. Well, are they all the same size?

A. I couldn't swear by that, no.

Q. Well, I will ask it this way. Can you put that, as you say that number 3 hatch cover, up in the forward part of the hold? A. I think so, yes.

Q. So you could put them any way; is that it?

A. They are standard size, as far as I could tell or know.

Q. Now, other than treading on the hatch cover, was there any other way to have put number 4 board in place?

A. Oh, I guess there are various ways, yes.

Q. Without having to step on the hatch board?

(Testimony of Clarence Uskoski.)

A. Oh, you have to step on them sooner or later, yes.

Q. Well, couldn't you have come up from the number 2 position and put it on?

A. Yes, but then I would have had to walk on number 1 hatch.

Q. Pardon me?

A. But I would have had to walk on number 1 hatch board.

Mr. Roberts: I think that's all, Mr. Uskoski.

Further Cross-Examination

By Mr. Wood:

Q. Mr. Uskoski, when you longshoremen first went down [26] there in the morning, you found this hatch all covered up, didn't you?

A. Lower 'tween decks, yes.

Q. It was all covered? A. Yes.

Q. But there was a slight peak there where the after beam, the crossbeam was a little raised?

A. That's right.

Q. By the way, I think there are eight crossbeams on that hatch, I noticed you put six, I don't think it makes a great deal of difference, but I believe there are eight, aren't there?

A. Seven or eight.

Q. Now, just so we can talk together intelligently, beginning at the forward end you speak of the number 1 crossbeam and then numbers 2, 3, 4, and back, and the last one is number 8. Isn't that the way you describe it?

(Testimony of Clarence Uskoski.)

A. Something or—something that way, yes, sir.

Q. Let's call it that way, yes, so we can talk easily. When you found this slight elevation there at the after end of the hatch, you had a discussion and you decided to change the crossbeams, didn't you?

A. Yes.

Q. Then after you changed the crossbeam, having taken off those hatch covers for that purpose and you brought [27] the forward number 1 crossbeam back and put it in number 8's place and reversed them, then all the beams were level, weren't they?

A. That is right, sir.

Q. And when they were all level, that was the way they should be, wasn't it?

A. That's right, sir.

Q. So there was no further complaint about the beams, was there; that's right, isn't it?

A. That's right.

Q. And it was in the process then of putting the hatch covers back on the after beam that the accident happened?

A. Yes, sir.

Q. Now, I thought you said in the beginning that it was the number 1 hatch cover that was marked there on the blackboard that fell, but later I understood you to say it might have been 2 or 3. Now, which is right?

A. I said 1 or 3.

Q. 1 or 3?

A. Yes, that's what I said, yes.

Q. But you don't know which one?

A. No.

Q. I understood you to say originally that it was

(Testimony of Clarence Uskoski.)

number 1 and that you know it was in place because you wouldn't have stepped there if it hadn't been in place; you also looked [28] to see——

A. No, when—at the time we set them in place, we set them in the right place.

Q. Well then, to the best of your belief and knowledge, both number 1 and number 3 were in place, weren't they? A. Yes, sir.

Q. Setting down on the flange of the crossbeam and level? A. Yes, sir.

Q. Did you hear the discussion about going and getting some lumber to what they call "floor" this hatch off? A. Yes.

Q. That was the plan, to make it safer, wasn't it?

A. Yes, we couldn't find—if we couldn't find beams to fit.

Q. I mean, that's what you were going after, you made this transposition of the beams and were putting back the hatch covers, then when you got the hatch covers all in place you were going to floor off with lumber? A. Yes.

Q. To make it a safer place to work?

A. Yes, sir.

Q. Because you didn't trust the hatch covers?

A. Yes, sir.

Mr. Wood: That's all.

Mr. Morrison: I'd like to have this marked [29] for identification—oh, yes, this has been marked.

The Court: All the exhibits that have been marked as exhibits are deemed to have been offered and admitted subject to such objections as may have

(Testimony of Clarence Uskoski.)

been heretofore made or may hereafter be stated.
Everything is in now.

Mr. Morrison: May I hand this to the witness?

The Court: Yes.

Redirect Examination

By Mr. Morrison:

Q. What does that picture show; does that show the floor covering you put on that?

A. That's part of it.

Q. Part of the lumber you put on there?

A. Yes, sir.

Q. And you put that on on account, you say, number 1, on account of the wobbly hatches?

A. Yes, sir.

Q. Now, do some of the hatch covers appear to be upside down there, set in upside down, do you know?

A. Yes, sir.

Q. Will you point that out to the Court?

The Court: I am looking over your shoulder.

Q. (By Mr. Morrison): Just the ones that are upside down.

A. The ones that are upside down——

The Court: Do you want to come up here, gentlemen? [30]

The Witness: These are upside down, with the ridges on them.

Q. (By Mr. Morrison): Why were they put in upside down?

(Testimony of Clarence Uskoski.)

A. We believed they were safer that way because they were cupped.

Q. Because they were bent, you thought it was safe to put them in upside down?

A. To get the rocking motion away from them.

The Court: Well, Mr. Wood, you didn't develop your point completely. You claim that they were in the process of covering them?

Mr. Wood: They were in the process of flooring off, but they hadn't quite reached that point yet.

The Court: You didn't ask him those questions, you said that was the plan, but you didn't ask him whether it had progressed to any extent. This picture that you show here, was that taken——

Mr. Morrison: That was the plan that went into effect afterwards.

The Court: No, wait, this picture doesn't represent the scene of the accident?

The Witness: Yes.

Mr. Morrison: No, your Honor, that's later, to show what they did and as to some of the covers upside down.

The Court: You don't think they had partially floored off? [31]

Mr. Wood: No, they had not reached the flooring off with the lumber.

The Court: You didn't develop what you said in your opening statement, that people had gone off to get lumber.

Mr. Wood: Well, I will, thank you for suggesting it.

(Testimony of Clarence Uskoski.)

While you were doing this work with Swanson that you just descried, the gang boss and some of the longshoremen had gone off to get lumber to floor off with, had they not?

The Witness: The walking boss said he would go order lumber.

Mr. Wood: And had he gone to do it?

The Witness: Yes, I believe so.

Mr. Wood: And while he was gone was when this happened?

The Witness: Yes, sir.

Mr. Wood: And then afterwards did you floor off with lumber?

The Witness: Yes, as the picture shows.

Mr. Wood: Let me see that picture.

(Photograph handed to counsel.)

Mr. Wood: Yes, I don't think I have seen that picture before, but it isn't claimed that this was taken at the time of the accident?

Mr. Morrison: No, that was afterward, showing it floored off. [32]

Mr. Wood: It's just showing us what they mean by flooring off?

Mr. Morrison: And to show the fact that some of these hatches were put in upside down afterwards.

Mr. Wood: But what percentage of these hatch covers were put in upside down; would there have been half of them?

(Testimony of Clarence Uskoski.)

The Witness: I think more than half of them would be put in upside down.

Mr. Wood: Do you think I have developed that sufficiently or——

The Court: I have read the deposition so I am pretty well in the middle of this case already.

Mr. Roberts: Have you finished?

Mr. Morrison: Yes.

Recross-Examination

By Mr. Roberts:

Q. Mr. Uskoski, as I understand it, just to tell Judge McColloch about the flooring part of it, after the accident and after you completely covered—you still covered the hatch with boards of wood, the openings?

A. Yes, and the ship sent some wooden hatch covers in to replace the real bad ones.

Q. Then you started to replace them; is that it?

A. Yes, after it happened, yes. [32-A]

Q. And the photograph shows some of the hatches, the steel ones upside down and the rest of them right side up? A. Yes.

Q. Why, do you think they wouldn't rock as much upside down?

A. Yes, they wouldn't have that bow in them. When a hatch board is bent, the ends are upright.

Q. Yes? A. The ends of them are up.

Q. But each end is not up at the same distance?

A. No.

Q. You could have one corner a little higher?

(Testimony of Clarence Uskoski.)

A. Yes, but they will stay in better that way.

Q. But you still get a rock, don't you?

A. Not too much; it's a little safer.

Q. Now Mr. Uskoski, this was sticking up how many inches, this beam that you think was misplaced?

A. The beam itself, I'd say three or four inches higher than normally.

Q. Do you think you could have left that beam as it was and just placed lumber over it?

A. It wouldn't be very level.

Q. What? A. It wouldn't be very level.

Q. But it would be safe, wouldn't it? [33]

A. No.

Q. Why not?

A. Because what would make it any safer than otherwise?

Q. Pardon me?

A. No, that's your safety rules, we have to put those beams on firmly.

Q. I see. Wouldn't it—considering that you are loading a cargo, wouldn't the lumber eventually drive the beam down into its proper position?

A. I couldn't say that.

Q. You don't know?

The Court: How do you think the accident happened?

The Witness: Pardon me?

The Court: You heard that, didn't you? Didn't you hear what I asked you?

The Witness: I was looking that way.

(Testimony of Clarence Uskoski.)

The Court: I don't blame you, he is a very fine-looking man. How do you think the accident happened?

The Witness: What caused it?

The Court: Yes.

The Witness: Well, all I can say is what I said before, that he stepped on that cover; it slipped or gave way on him.

The Court: Well, what made it slip or give way on him? [34]

The Witness: I couldn't judge that because either it was bent so much that it was a little short and gave way or he could have stepped on one end, the other end rode up on top of that catch and it slid forward.

The Court: Go ahead, gentlemen, it's your case.

Q. (By Mr. Roberts): When you say it slid forward, what direction on this diagram, to the left or down?

A. Forward.

Q. The way the arrow is pointed?

A. The way the arrow is pointing.

Q. So it would have to go up over the ledge, wouldn't it?

A. That's what I mean, he stepped on one end; it's got a bow in it and it raised the other end enough to come on top of that and it slid forward.

Q. Now, could you tell the Court what part of the board that he was on just immediately before the accident occurred and he fell in the hold; was he on the forward part of the hatch cover or toward the coaming?

(Testimony of Clarence Uskoski.)

A. I—that question isn't quite clear to me.

Q. Well Mr. Uskoski, you said he stepped on the board and everything happened real fast?

A. Yes.

Q. Now, was it when he was first—you know the board, the cover before would be forward and aft, wouldn't it?

A. Yes. [35]

Q. Now, was he forward, on the forward end of the cover or the front end of the ship or the back end—

A. I couldn't say.

Q. —or was he in the middle; you don't know?

A. No, I couldn't say.

Q. And you two fellows placed the cover that went in the hold; is that correct?

A. Yes.

Q. And as I understand your testimony, you don't know or you think that all the covers on this particular opening are all the same size and width?

A. Are supposed to be, yes.

Mr. Roberts: O.K., thank you.

Mr. Morrison: Just to make myself clear, did I understand that if there were a bow in that hatch cover and you stepped on one end of it, it will raise the other end up above the catch?

The Witness: That's right.

Mr. Morrison: That will cause it to slide?

The Witness: Yes.

Mr. Morrison: That's all.

(Witness excused.)

Mr. Morrison: Call Edwin Ferraris. [36]

EDWIN FERRARIS

produced as a witness on behalf of the plaintiff and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. What is your full name, please?

A. Edwin Ferraris.

Q. And where do you live?

A. I live at 2940 North——

Q. Would you state your name a little louder, please?

A. Edwin Ferraris, F-e-r-r-a-r-i-s (spelling).

Q. And where do you live, again?

A. 2940 Northwest Savier.

Q. What type of work do you follow?

A. Longshoring.

Q. How long have you longshored?

A. Five and a half years.

Q. And were you working on this—down there the morning of the accident?

A. Yes, sir.

Q. Were you on this same gang?

A. Yes, sir.

Q. Did you see the accident?

A. Yes.

Q. Where were you at the time? [37]

A. Well, I can show better on the diagram; I was inshore.

Q. Step right down to the diagram then.

A. Right here (indicating).

Q. Is there a piece of chalk there?

(Testimony of Edwin Ferraris.)

A. I was approximately——

The Court: Just put your initial there, the initial of your last name.

The Witness: Yes.

Q. (By Mr. Morrison): Now, what did you see?

A. Well, at that time I was looking across the hatch and all of a sudden I didn't see Swanson, he and Clarence were coming across at this angle (indicating) and I was looking over there and Swanson just disappeared, and then I looked down and he was laying down in the lower hold, athwartship, on his back.

Q. And were there hatch covers down with him?

A. Yes, sir.

Q. How many? A. Two of them.

Q. Now, you may take the stand.

The Court: How far were you from him?

The Witness: Oh, I think the width of this was perhaps 20 feet, I would say. I think it's 20 feet.

The Court: Which two hatch covers were down with him; I don't suppose you know of those that are marked on [38] the board?

The Witness: Well, I'd say the one that went with him——

The Court: Call them by number.

The Witness: I'd say that—well, of course, I'd say that number 3 went down with him, or something, and the one that they were carrying, it was a—he was across one, had one under him.

The Court: 3 and 4?

(Testimony of Edwin Ferraris.)

The Witness: No. 3, and the one they had in their hands.

The Court: Which two, by numbers, went down the way you saw it?

The Witness: Just 3 by numbers, and the one that they were——

The Court: Well, weren't they carrying one of those four?

The Witness: No; the one they were carrying went down with Swanson.

Mr. Beebe: I think, your Honor, that the testimony was that they were going to place 4, and that 4 that appears on the diagram wasn't actually there, it was where they were going to put it.

The Court: That's what I am trying to find out, I am asking what went down with him, what number?

The Witness: Number 3 went down and the one they were [39] carrying.

The Court: Which was number 4?

The Witness: Number 4.

Mr. Roberts: Was number 4 the one that——

Mr. Morrison: That's the one they were going to put down. All right, you can take the stand.

The Court: You better leave that 4 on there; that isn't your map.

The Witness: Oh, I am sorry.

(Witness resumes stand.)

Q. (By Mr. Morrison): Now, what then, were these hatch covers raised up, were these hatch cov-

(Testimony of Edwin Ferraris.)

ers raised up from the hold? A. Yes, sir.

Q. And who lifted them up, do you recall?

A. Oh, they passed them up to me.

Q. Passed them up to you? A. Yes.

Q. And where did you put them?

A. I put them in the trunk on the side.

Q. And did they remain there; were they still there when the pictures were taken? A. Yes.

Q. And about how long after that were pictures taken of them? [40]

A. Oh, I'd say an hour or so before they came down, maybe it was longer.

Q. 2-F, 2-B and 2-C, I will ask you if that is the two that went down into the hold?

Mr. Roberts: Your Honor, I'd like to know, first of all, who took the pictures and whether he was there when they were taken?

Mr. Morrison: It was Nick Chaveau that took them.

The Court: When?

Mr. Roberts: He is from Frank Pozzi's office?

Mr. Morrison: And your people were out there and took them a few minutes after that?

The Witness: These are the ones (indicating).

Q. (By Mr. Morrison): These two (indicating)? A. Yes, sir.

Q. And do those show the bends we have been speaking of? A. Yes.

The Court: Well, they are all admitted, everything is in.

(Testimony of Edwin Ferraris.)

Mr. Morrison: I would like to hand those to the Court.

The Court: All right.

(Photographs handed to the Court.)

Q. (By Mr. Morrison): Plaintiff's Exhibit 2-G, does this picture show the two hatch covers down in the hold before they were lifted up? [41]

A. No; they—did you say that it showed them down there?

Q. That's the two hatch covers down in the hold, is it not?

A. Down in the lower hold where Swanson was?

Q. Yes.

A. No; they didn't take any pictures down there in the lower hold, because we had covered up; we had covered up and put the lumber down, then the photographers came.

Q. This is showing them on the 'tween deck then? A. Yes.

Q. But is that the two I had reference to, the two that were lifted up from the hold?

A. Yes.

Q. Now, did you observe some of these put in upside down? A. Yes.

Q. And where were they put in that way?

A. Well, I think we just figured it was a better deal to put them in that way, so there was less rock, it was to try to make them less rocky.

Q. You mean rocky, because they were bowed like a saucer? A. Yes, sir.

(Testimony of Edwin Ferraris.)

Q. Now, did you know Mr. Swanson fairly well before this accident?

A. Yes; I talked to him quite often.

Q. What kind of a worker was he? [42]

A. He was a good worker.

Q. What was the condition of his general health?

A. He was in excellent health.

Q. And how was he—was he a jovial sort of person?

A. Yes, sir.

Q. Have you seen him since the accident?

A. Yes; I have.

Q. How many times have you seen him since the accident?

A. Oh, at the hospital twice, one time in the barber shop and at the hall a couple of times when he was around up there visiting, about—I'd say four times and this morning.

Q. Now, I am not speaking about that time you have seen him in the hospital, but the times you have seen him that you referred to, did you talk to him on these occasions?

A. Yes; I have talked to him—about the case?

Q. Oh, no. A. Just talking?

Q. Just talking to him general, what is—did you find him in the same mental condition that he was in before this accident?

A. No; he seems pretty moody and I don't know, kind of forgetful. He didn't remember my name, I know, and I don't know, kind of like he is—

Q. Speak a little louder.

(Testimony of Edwin Ferraris.)

A. I'd say it was kind of like a little punchy, he didn't [43] seem quite right.

Q. You have noticed a mental change in him?

A. Definitely.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Mr. Ferraris, is that the name?

A. Yes.

Q. Talking about Mr. Swanson, most of you fellows who worked in those gangs, you know one another by nicknames, don't you, usually?

A. Well, not necessarily. I don't have a nickname there.

Q. Did you have any social contact with Mr. Swanson before this accident?

A. Oh, yes; I used to talk with him and talk to him about building the house that he was building before he was hurt.

Q. Would you say he was a quiet sort of an individual, sort of an introvert?

A. No; I would say he was quite an extrovert; he was quite an outspoken person.

Q. Do you know how long he had been on the water front?

A. No; I don't. I couldn't say definitely; I heard some of the fellows say that he came in '42 and then he said he didn't know, but he was there before I was.

(Testimony of Edwin Ferraris.)

Q. Had you worked with him as a partner? [44]

A. Have I ever worked with him as a partner?

Q. Yes. A. No; I haven't.

Q. As I understand it, these two boards that look as though they are in the wings weren't photographed in the lower hold, were they?

A. Where Swanson was?

Q. Yes. A. No, sir.

Q. Would you tell the Court the amount of head room in the lower hold where Swanson fell?

A. It was after he went down, I would say it's—it was this high (indicating) up to the top of the hatch cover.

Q. About seven feet? A. Eight feet.

Q. What would you say the—or—well, on Plaintiff's Exhibit 2-C, this is one of the boards that you found in the hold; is that right?

A. Yes, sir.

Q. Hatch covers you found in the hold?

A. Yes, sir.

Q. Do you know whether that was the one that Mr. Swanson stepped on or do you know which one?

A. I'd say—it's quite hard to say which one he stepped on, but it had to be the one—I'd say he stepped on the [45] one that was under him at the time.

Q. Which one was under him, or do you know?

A. Well——

Q. Actually, Mr. Ferraris, when the two boards——

A. Actually these pictures both show the hatch

(Testimony of Edwin Ferraris.)

covers, and I know these photographs—it would be hard to say—just to say which one, and as to—I just couldn't say.

Q. 2-B, what I was going to say, when the covers were brought up to the 'tween deck, the first one was under Mr. Swanson, and then this one (indicating)?

A. No; I couldn't pick them out. Now, the first one that came out was the one that—well, the first one—well, John would have to say which was the first one because he got down there and handed them up.

Q. You don't know which one it was?

A. These are the two that were down there.

Q. Would you say—just look at the corners of that—

A. Yes.

Q. What would you say the height above the flat part of any one corner would be?

A. Above the ground?

Q. Yes.

A. Well, if I—they look like they're about—this one here (indicating) looks like it's about three inches above the ground, and this one here looks like it was [46] about two inches.

Q. Could I have those back?

(Photographs handed to counsel.)

Q. Had you or any one of the gang made any complaints of those covers to any of the officers or anyone representing Matson or Oceanic?

(Testimony of Edwin Ferraris.)

A. We have since—you mean at this particular time?

Q. Before the accident.

A. Before the accident, made the complaint to the gang boss and the walking boss, I imagine this was as far as it went. I don't think there was any officers there.

Q. Those men worked for the stevedoring company; is that correct, the gang boss and the walking boss, is that correct? A. Yes.

Q. Were you with the entire gang when you went to work that morning, Mr. Ferraris?

A. Was I with the entire gang?

Q. Yes.

A. I was sent from the hall to work with the gang.

Q. Was Mr. Swanson there?

A. No; I believe Swanson came later for some reason or other. I don't know just why.

Q. What was this discussion when you got down to this between deck and saw the condition down there?

A. Well, we got down there and that beam was raised, and— [47] is that the aft beam—was raised about four inches and so they, the walking boss came along and he decided that being it didn't look right and they decided to change it, to make a level deck.

Q. Who said that?

A. Well, the gang boss said to change it because that's where we take our orders from, and the gang

(Testimony of Edwin Ferraris.)

boss transferred the order to the walking boss, and the walking boss says to change it, so we changed it.

Q. What was this about covering the opening with lumber?

A. Well, the reason of that was to make darn sure that no more of these beams would stick out under us.

Q. Were you going to cover it with lumber originally, even before you lifted the two beams?

A. No.

Q. You weren't?

A. No; that came in after we decided it was safer, and they decided to cover it with lumber to make it safer, an extra safety precaution.

Q. How would that lumber make it safer?

A. Well, you wouldn't have to step on the hatch covers, you step on the lumber and the lumber is across all the beams, and you don't easily step through with a solid deck of lumber.

Q. You don't have to step on the hatch covers of steel; [48] is that correct? A. Definitely.

Q. Is that correct? A. Yes.

Q. Now, you say you were standing at a position aft; is that correct? A. Yes.

Q. And to your recollection, hatch covers 1, 2 and 3 were in place? A. 1, 2, 3, yes.

Q. Is that right? A. Yes.

Q. And Mr. Swanson and Mr. Uskoski were bringing the covers from the point at the lower left-hand side there; is that correct? A. Uh-huh.

Q. Was Swanson leading? A. Yes.

(Testimony of Edwin Ferraris.)

Q. And before we go any further, that 1, 2 and 3 were on, where would they put the next one?

A. I would say it would go where 4 was.

Q. That's the way you usually covered up; is that correct?

A. Yes; we cover across; that's right.

Q. Well, would you put in 4 first?

A. No. [49]

Q. Were you covering upon the port side over there?

A. I can't remember; we could have had our side done or something. I was kind of watching. I wasn't doing anything, I know that. I was just watching.

Q. You didn't see what happened to the hatch cover number 3, as to the position on the beam or flange or catch or anything?

A. Before the accident?

Q. Yes.

A. No; I wasn't paying any attention.

Q. You just saw the board go and——

A. Yes; he stepped and he was gone, that's all.

Q. Now, how did Mr. Swanson fall? Did he fall over the aft beam?

A. That's what I say, he just went so fast, he just actually disappeared ahead of me. He just was gone, it was fast, he went—I didn't even see him—I didn't even see him stagger. I was looking there and the next thing I knew he was gone, and I looked down and there he was. I hesitated. I looked down at him and he didn't move.

(Testimony of Edwin Ferraris.)

Q. Mr. Ferraris, did you see any—oh, it might have been either the board or hatch cover number 3, and the one they were holding——

A. Did I what?

Q. Did you see whether that reached the bottom before [50] Mr. Swanson or anything like that?

A. Number 3?

Q. Yes.

A. No; I didn't; everything happened too fast.

Q. Was he laying on the hatch cover?

A. Yes; he was across it, his middle, and he was on his side and faced aft laying athwartship, kind of in a bent-knee position.

Mr. Roberts: I think that's all.

Further Cross-Examination

By Mr. Wood:

Q. Mr. Ferraris, just a few questions. The counsel here just asked you, I thought, maybe I misunderstood him, whether the plan was to cover up the openings with the lumber, but you were going to cover up the whole hatch with lumber, weren't you?

A. Oh, yes, sir.

Q. And that was decided on before the accident?

A. Yes.

Q. After the beams were transposed and the thing was level, then the plan was to put the hatch covers in place and floor off the whole thing with lumber? A. That was the plan.

Q. That was the order of the gang boss?

(Testimony of Edwin Ferraris.)

A. Yes.

Q. And when the beams were transposed, they were level [51] and all the beams were in good condition, weren't they? A. Yes.

Q. And after the accident, was that plan carried out, that they did floor off with lumber?

A. Yes; that's where the picture comes into effect there, that one picture.

Mr. Wood: That's all; thank you.

Redirect Examination

By Mr. Morrison:

Q. You speak of a raise on the end of one hatch cover, you estimated of three inches, and the next one about two. Is that the bow in them?

A. Yes; I'd say that they were bowed like that.

Q. They were bowed like that?

A. They act like a seesaw, anyway.

Q. Like a what?

A. Well, they act like a seesaw.

Mr. Morrison: That's all.

Recross-Examination

By Mr. Roberts:

Q. Do you know whether all the hatch covers in this particular 'tween deck, number 3 hold, were of the same size?

A. Well, they should have been the same size because the distance between all the beams should have been the same; that's about all. [52]

(Testimony of Edwin Ferraris.)

Q. But you don't know, do you?

A. I didn't measure them; no, sir.

Q. And is there any way in which these hatch covers could be replaced without walking on them, couldn't you slide them over from the side?

A. Well, on those wood ones you could, but on the steel ones, usually if they were cupped they probably would slide under each other.

Q. But you could slide them, couldn't you?

A. Oh, not those; they were too badly bent.

Q. You think this one here on Plaintiff's Exhibit C is badly bent?

A. That's a defective one; yes, sir.

Mr. Roberts: I think that's all.

Mr. Morrison: Would you not still have to walk on them, though, to place them?

The Witness: Yes; you got to get out—if one was to stop when you got it down in there as it was sliding, you would have to go out in there and pry it loose and get it moving again.

Mr. Morrison: That's all.

(Witness excused.)

Mr. Morrison: Call Mr. Raanes. [53]

JOHN RAANES

produced as a witness on behalf of the plaintiff and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. What is your name, please?

A. John Raanes.

Q. Where do you live?

A. 3536 Northeast 60th.

Q. And——

The Court: One of the gentlemen didn't understand your name.

Mr. Roberts: What did you say your name was?

The Witness: John Raanes, R-a-a-n-e-s (spelling).

Q. (By Mr. Morrison): You are a longshoreman, are you not? A. Yes.

Q. And were you on this gang on the day this accident happened? A. Yes.

Q. Did you see the accident?

A. No, sir; I didn't see it.

Q. You did not. Did you go down in the hold after, immediately after this accident?

A. I went down in the hold after the accident; yes, sir. [54]

Q. And did you hand up these two hatch covers?

A. Yes, sir.

Q. And what was the condition of those two hatch covers that you handed up?

(Testimony of John Raanes.)

A. They were bent quite badly.

Q. Both of them? A. Yes, sir.

Q. And were you around there when the pictures were taken or not?

A. Yes; I know where I was when the pictures were taken, I was around there.

Q. Do you recognize this picture as the covers you were handing up (indicating)?

A. Well, they look like the covers.

Q. They look like the covers?

A. Yes, sir. Look like them.

Q. Did you know Swanson before this accident?

A. I worked with him quite a few times; yes, sir.

Q. You worked with him quite a few times?

A. Yes; in the same gangs.

Q. What kind of worker was he?

A. He was a good worker.

Q. What was the condition of his health?

A. Well, as far as I could see he was in good health at all times when I worked with him. [55]

Q. Have you seen him since the accident?

A. No, sir; not until today.

Q. Not until today? A. No, sir.

Q. Do you notice any change in his general appearance in looking at him today?

A. Yes; I do.

Mr. Morrison: You may cross-examine.

(Testimony of John Raanes.)

Cross-Examination

By Mr. Roberts:

Q. You didn't see the accident, Mr. Raanes?

A. No; I had my back turned.

Q. Pardon me? A. I had my back turned.

Q. Where were you in the 'tween deck?

A. I was there covering up the other end of the hatch.

Q. You were up in the forward part of the hatch? A. Yes.

Q. Were you covering up this, too?

A. Yes, sir; they were covering up.

Q. Were you one of the longshoremen that was actually covering? A. Yes, sir.

Q. Did you see any hatch covers like these that you picked up from the bottom of the hold? [56]

A. Like those, yes.

Q. And the hatch covers that you were replacing, were these the same ones that you took off when you originally uncovered and changed the beams?

A. They were the same hatch covers; we had no others to put on.

Q. Do you know whether the hatch covers on this particular opening are all the same size and width and dimension?

A. I never measured them; we assumed that they were the same size as those steel hatches.

Q. How about the deck above, would they be the same size, or do you know? A. I don't know.

Q. Do you know whether there is any possibility

(Testimony of John Raanes.)

that those hatch covers had been mingled or switched with the after hatch covers?

A. Possibly they could be switched, I don't know; it could be switched.

Q. When you work on one of these ships, Mr. Raanes, on the ones that have steel hatch covers, are there or are there not any spare hatch covers in the wings that the men leave around?

A. Yes, sir; in the wings, yes, sir.

Q. Do you know where that ship had come from prior to coming to Portland? [57]

A. Well, no, not in particular except what I heard.

Q. You had your back turned at the time and you don't know what happened; is that correct, or you didn't see Mr. Swanson——

A. I didn't see him go down; no, sir.

Q. Mr. Raanes, were you down there when you had this conference regarding the hatch covers?

A. Yes, sir.

Q. What was the subject of that?

A. Well, we could all see the beam was out of place and we decided to put it in its right place.

Q. How did you know which was the right place?

A. Well, we discovered that one of the beams, why, another beam was out of place and didn't quite fit in there, so we decided that that's where the after beam belongs.

Q. Did you actually measure the strongbacks?

A. No; I didn't, at least.

(Testimony of John Raanes.)

Q. You didn't, yourself? A. No.

Q. Who gave the order to switch the two beams?

A. Well, now, that I couldn't say who actually gave the order for that.

Q. Was the walking boss in the hold at that time?

A. That I wouldn't know. It seems to be a general practice when we decide on something, somebody says, "Well, let's [58] change this beam," and we change them.

Q. Do you know whether the conference that you had down there was to the effect that even if you'd have switched the beams, you're still going to cover the hatch opening with lumber before you work on it?

A. That's the understanding because the hatch boards were so badly bent, and for my part, I didn't like to be walking on them.

Q. Longshoremen don't, as a rule, like to work on steel hatch covers?

A. No; for my part, I don't like them. In fact, I am scared of them.

Q. All right. Is it possible to bend them back?

A. It seems like they won't bend back again.

Q. All right. You don't have that trouble with wood?

A. Not so much; some wood hatch covers are warped, too, but not nearly as bad.

Q. You have trouble with those coming apart?

A. Pardon me?

(Testimony of John Raanes.)

Q. You have trouble with those just coming apart? A. Yes.

Q. By the way, what do the fellows on the water front, the longshoremen—do they have any set retirement these days, or what age do they retire at?

A. What age do they retire at? [59]

Q. Yes. A. 65.

Q. How long have you been on the water front?

A. Approximately 25 years.

Q. Have you worked on the Ventura before or any of these C-2 types?

A. Well, I couldn't place it; I assume that I have worked on them; I worked on quite a number of ships.

Q. You worked on them, at least, with steel hatch covers?

A. Yes; I worked with steel hatches on other ships.

Q. Similar types of hatch covers before this accident? A. Some similar, yes.

Q. And these crossbeams or strongbacks, whatever you want to call them, do you know what that ledge is, the thickness of the ledge that the hatch cover rests on? A. Well, two or three inches.

Q. How about the ledge around the hatch coaming itself?

A. That's approximately the same width.

Q. And how—about how high would you say the center of the strongback is; is it about the same height as the hatch cover?

A. Yes; about the same.

(Testimony of John Raanes.)

Q. These metal hatches, how thick would they be? A. How thick?

Q. Yes. [60]

A. I would say about a couple inches or so.

Q. How much would you say that they weighed, Mr. Raanes?

A. Oh, that's hard to say. I would guess at around between 30 or 40 pounds.

Q. You need two men to handle them comfortably?

A. Well, it's not impossible. I have no trouble lifting them out of the hatch, but it's impractical to handle them.

Q. I am handing you Plaintiff's Exhibit 2-B. Are all those hatch covers like that, insofar as the handles are concerned, there is a handle at each corner? A. Yes.

Q. And what is that handle made of, just a hole in the cover with a bar across it?

A. That's right; yes.

Mr. Roberts: I see. That's all, Mr. Raanes.

Mr. Wood: No questions.

Mr. Morrison: That's all.

(Witness excused.)

The Court: It's about noon. 1:30 too early?

(No response.)

The Court: All right, 1:30.

(Whereupon, a recess was taken until 1:30 p.m. of the same day.) [61]

Afternoon Session

(Court reconvened, pursuant to adjournment, at 1:30 p.m., and proceedings were resumed as follows.)

(Whereupon, a document was marked Defendant Matson's Exhibit 56 for identification.)

The Court: All right, proceed.

Mr. Morrison: Call Mr. Swanson.

ALBERT SWANSON

produced as a witness on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. Your name, please?

A. Albert Swanson.

Q. Are you any relation to the plaintiff?

A. None whatsoever.

Q. And by whom are you employed?

A. Oh, the Water Front Employers.

Q. What is the nature of your work?

A. I am a winch driver.

Q. Were you present the day of the accident?

A. Yes, sir.

Q. You didn't see the accident? [62]

A. I didn't actually see it happen.

Q. Where were you at the time?

A. Well, I was taking the spreaders off the other

(Testimony of Albert Swanson.)

hook. We put that strongback in and I walked up to the deck load and was unhooking the spreader for the other fellow, my partner.

Q. You were up on the upper deck at the time?

A. Yes.

Q. Did you go down there afterward?

A. No; I didn't.

Q. And did you have occasion on that day, after the accident, to look over these hatch covers?

A. I could see the hatch covers before they took the strongback out of there.

Q. What was that?

A. I could see the hatch covers before they took the strongback out of there.

Q. You were present and helped move the strongback? A. I took the strongback out.

Q. You took it out?

A. Yes, and put the other one in.

Q. What were the condition of those hatch covers?

A. Well, they didn't look good from the deck.

Q. Explain that.

A. Well, they looked like they didn't fit good, they didn't [63] look like they fit good, it's pretty hard to see where we are, but it looked like they just didn't fit level. You could see that.

Q. Now, are these metal hatches used on many of these ships?

A. I believe there's only two ships come into Portland and have these metal hatches, and that's the Matson Alameda and the Ventura is the only

(Testimony of Albert Swanson.)

two that I can remember, outside of the Grace Line used to have them—wait, it was the Moore-Mack, it wasn't the Grace Line.

Q. Used to have them? A. Yes.

Q. Do they have them any longer?

A. No, sir.

Q. And the only two you know of——

A. That's the only two that I can remember.

Q. That come into Portland here at the present time with those steel hatches?

A. That's the only ones I know of.

Q. Did you know Guy Swanson before the accident?

A. Yes; I knew him pretty well, I'd say.

Q. What kind of a worker was he?

A. Good worker.

Q. And how was his health as far as you know?

A. Good, as far as I knew; he was well; he always ate a [64] big meal and always got around pretty good.

Q. What kind of a man was he? Was he a man of a jovial type? A. I beg your pardon?

Q. Was he a jovial-type person? A. Yes.

Q. Have you seen him since the accident?

A. Yes. I was at the hospital, I think, three times to see the man, then I seen him twice after that at the hall.

Q. You have seen him about twice then down at the hall?

A. I seen him last summer one time. I didn't

(Testimony of Albert Swanson.)

stop to talk to him. He was at the hall, but I didn't stop, I was driving.

Q. Now, I am not going to refer to the times, the occasions you saw him at the hospital, but on these occasions that you have seen him since he left the hospital, have you noticed anything different?

A. Yes; I'd say there was a lot of difference.

Q. What is that difference?

A. Well, he doesn't talk the same or act the same. He has got kind of a stare in his eyes.

Q. He has got a what?

A. Kind of a glare in his eyes, I'd say.

Q. Did he have that before?

A. I can't remember it. [65]

Q. You say he talks different?

A. Yes, he does. He is not the same man.

Q. He is not the same man?

A. No. I'd say he was about half the man he was before.

Q. And you see a change in his mental makeup?

A. Yes; I would say so.

Mr. Morrison: Cross-examine.

Cross-Examination

By Mr. Roberts:

Q. What was your job in the gang, Mr. Swanson? A. Winch driver.

Q. Oh, and you were on deck all the time; is that right? A. Yes, sir.

Q. Two decks above the 'tween deck?

(Testimony of Albert Swanson.)

A. Well, these winches I had ahold of that day were built up on the next deck above the main deck.

Q. You mean to say that you can see whether the hatch covers were raised or not at one particular strongback from that distance?

A. You could see the strongback was raised, the one we took out, and the hatches wasn't.

Q. How high were you above this deck?

A. Oh, I don't know, I didn't measure it. I'd say 20 feet, maybe.

Q. 20 feet, maybe, from the main deck down to this 'tween deck? [66]

A. Something like that; it's not much more than that.

Q. Well, you had to go through two decks, didn't you, to get down there——

A. I can't hear you.

Q. You had to go through two decks?

A. We went down one deck—two decks.

Q. And the 'tween deck was the next one?

A. Yes.

Q. How high would you say the strongback was up?

A. Well, I couldn't tell from up above, you could see it was sticking up. I wouldn't dare say.

Q. You—do you know which strongback was higher than the rest?

A. Yes; you could see that from the deck, the one was higher.

Q. And which one?

A. It was the after strongback, I think it was

(Testimony of Albert Swanson.)

number 7; there are seven strongbacks in those C-2's.

Q. How long have you been driving winches on the water front, Mr. Swanson?

A. Well, I don't know; it's going on—I started driving winches during the '34 strike.

Q. And on this occasion did you uncover right down from the main deck?

A. Yes, sir; we took the pontoons off. [67]

Q. I see. Was Mr. Swanson around, the other Mr. Swanson?

A. Oh, yes; he was there.

Q. And then he got down to the 'tween deck, the lower 'tween deck in number 3?

A. We had uncovered the upper 'tween deck.

Q. What?

A. We had uncovered the upper 'tween deck.

Q. Then you got to the lower 'tween deck?

A. Then we went to the lower one.

Q. And this is where you saw this raised strong-back?

A. Yes.

Q. Were you down there at this conference the men had, did you go down in the hold and have this conference with the men?

A. No, sir; we did not.

Q. You stayed up on deck with the winches?

A. We stayed up on deck.

Q. Do you know whether the walking boss was down there?

A. I seen him down there, yes.

Q. Who was the walking boss?

A. Glenn Burke.

Q. Does the supercargo go down?

(Testimony of Albert Swanson.)

A. I don't even remember who the supercargo was.

Q. Were there any Matson ship officers down there? A. I don't know. [68]

Q. Do you know whether any complaints were made to any of the ship's officers?

A. I wouldn't know that.

Q. Pardon me?

A. I wouldn't know that because I wasn't down in the hold and don't hear everything that goes on.

Q. Have you, yourself, uncovered, Mr. Swanson?

A. Several times, yes. We had to uncover these Moore-Mack ships years ago, and I had a gang and we fought every time they came in with the steel hatches; they weren't safe.

Q. Mr. Swanson, who gave you instructions to switch the two strongbacks?

A. They just said to hook onto it; we are going to change the strongbacks.

Q. You say that you did that?

A. I took the one out and my partner took the other one out and we just switched ends. We had both ends of the ship rigged.

Q. In order to do that, how many sections did the men down there uncover?

A. Well, they uncovered one strongback, had to uncover two sections.

Q. Did you see them do that? A. Yes.

Q. Did you see what they did with the hatch covers they [69] removed?

(Testimony of Albert Swanson.)

A. Well, they either put them aft or in the wing. I didn't pay attention.

Q. Do you know whether they put any hatch covers in the wings?

A. No; I wouldn't know that.

Q. Were all the hatch covers the same size?

A. I'd say they were.

Q. The forward hatch covers were the same size as the after hatch covers?

A. I think they run about four and a half feet, if I remember right.

Q. You didn't actually see the accident?

A. No; I didn't. I was taking the spreaders off the other hook at the time the accident happened. The guy hollered there was a man in the hold; they wanted a board.

Q. After the accident and the covers had been replaced, did the men work on the covers at that time; after the accident and when the openings were being covered, did the men work on it or did they cover it with dunnage or lumber?

A. We covered it with dunnage, they restripped her both ways.

Q. Was it dunnage, in fact, or was it some of the cargo that was to be loaded in the wings?

A. Well, that I don't know. [70]

Q. Weren't you loading it?

A. Well, there was two-inch lumber they laid on the hatch.

Q. What were you loading at this time?

A. I don't remember.

(Testimony of Albert Swanson.)

Q. You don't know. Was the length of the lumber right across the hatch opening?

A. Yes; everything was open in the wings; we put the lumber in the wings.

Q. And you went down there during this conference? A. No; I didn't go down, I said.

Q. Do you know whether the men down there made any measurements of the strongbacks?

A. No; I wouldn't know. I know the strongback, the one I took out didn't fit, and the one I put in did.

Q. How do you know that?

A. Well, you can see it. It went down in.

Q. Did you check the slots where the strongbacks were to lay on?

A. No; I didn't check it.

Q. Do you know whether there was any debris or anything in there?

A. I couldn't check it, not from where I was.

Q. You don't know whether those slots were squashed in or anything? [71]

A. No; I don't.

Q. Are those beams in those particular hatch openings interchangeable?

A. The beams, they are on most ships, yes.

Q. Were they on this one?

A. I don't know; we changed number 1 and number 7 and it fitted, it fitted right. Sometimes your hatch—you get something heavy you're putting on it, and the beams might just make a difference in whether you get it in or not.

(Testimony of Albert Swanson.)

Q. Even though they were constructed to be interchangeable? A. Yes.

Q. Did you have any social contacts or anything of that nature with Mr. Swanson before the accident? A. Social?

Q. Yes; did you go out?

A. No; only thing we went out to dinner a lot of times together; we went out and I always went to dinner when he was on the ship with us.

Q. Would you say he was a quiet type of individual?

A. Well, he was a—I don't know what you mean by "quiet."

Q. Well, would he be boisterous?

A. No; he wasn't. He did a lot of talking but then a lot of us do that. I never seen him, I never seen the man take a drink as long as I knew him.

Mr. Roberts: I think that's all, Mr. [72] Swanson.

Mr. Wood: No cross.

Mr. Morrison: That's all.

(Witness excused.)

Mr. Morrison: Call Mr. Lundstrom.

JOHN D. LUNDSTRUM

produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. May it please the Court, this gentleman has a little difficulty with his hearing.

The Court: All right.

Q. (By Mr. Morrison): Can you hear all right now?

A. Yes.

Q. What is your name?

A. John D. Lundstrom.

Q. And where do you live?

A. Gresham.

Q. And what do you do?

A. I am a longshoreman.

Q. What type of work do you do?

A. Supposed to be gang boss.

Q. Were you a gang boss at the time of this accident?

A. Yes.

Q. And that's the particular gang that Mr. Swanson was with? [73]

A. Yes.

Q. Did you see the accident?

A. Yes; I did.

Q. What did you see?

A. I seen him fall down in the hold.

Q. You saw him fall?

A. Yes.

Q. About how far away were you from him?

A. Well, I was passing one of the hatches.

Q. In distance in feet, about how far?

(Testimony of John D. Lundstrom.)

A. Oh, I imagine—I don't know how long the hatch was—oh, I imagine between 15 and 20 feet.

Q. Was he in the act of falling when you saw him?
A. Yes.

Q. And did you go down in the hold afterward, did you go down where he was in the hold?

A. No; I didn't go down.

Q. About how far did he fall?

A. Oh, around seven—eight feet.

Q. Seven or eight feet. Were you there when they took him out?
A. Yes.

Q. Did you help them take him out?

A. They took him out in a casket.

Q. One of these baskets? [74]

A. Basket, I mean, not a casket. In a basket.

Q. Now, did you observe these hatch covers there, the condition of them that day?

A. Yes.

Q. What was the condition of these hatches?

A. Just all bent out of shape.

Q. All bent out of shape?
A. Yes.

Q. And afterwards did you lay boards on there before they laid the lumber?

A. After we put the hatch covers back, I laid a floor of lumber on top of them.

Q. Why did you do that?

A. To hold them down so they wouldn't jump up again.

Q. To hold them down so they wouldn't move out of place?
A. Yes.

(Testimony of John D. Lundstrom.)

Q. Did you know Mr. Swanson before the accident? A. Oh, yes.

Q. And what kind of a worker was he?

A. He was an awful good worker.

Q. Good worker?

A. (Witness nods head.)

Q. Habits all right? A. Yes.

Q. What was the general condition of his health; was he [75] in good health?

A. Yes; he was in good health; he was an awful good worker.

Q. Have you seen him since the accident?

A. Yes; I have.

Q. About how many times?

A. Well, I went up there three times to the hospital, then I seen him once last spring at his apartment.

Q. You saw him last spring; did you talk to him there? A. Yes.

Q. Did you notice any change in him?

A. Yes; there is a big change in that man.

Q. What do you notice, what kind of a change?

A. Well, he doesn't act like he used to.

Q. Do you notice any change in his personality?

A. Yes; there is.

Q. Does he talk the same as he used to?

A. No.

Q. Does he talk about the same things that he used to? A. That's right.

Q. Now, do you notice any difference in his appearance? A. Oh, yes, sir.

(Testimony of John D. Lundstrom.)

Q. What did you notice on that?

Q. Well, he didn't look right to me.

Q. He didn't look right? [76]

A. (Witness nods head.)

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Mr. Lundstrom, Mr. Swanson is about the same weight, isn't he, as when he was working?

A. You better come here. I didn't hear you.

Q. Mr. Swanson is about the same weight, isn't he; same weight as what it was on the water front?

A. Well, he looks about the same, same weight.

Q. About the same weight; he is not as talkative; he doesn't talk as much as he used to; is that it?

A. No.

Q. What would you say was the matter with him?

A. I don't know what is the matter with him.

Q. You don't know? A. No; I don't know.

Q. Mr. Lundstrom, you were in charge of the gang that particular day; is that correct?

A. Yes.

Q. There were 13 men in the gang; is that right?

A. Thirteen, yes.

Q. And with yourself making the 14; 14 with yourself? A. No, sir; 13 and myself.

Q. I see. And you have a steward, a safety steward; do [77] you have a safety man there, or steward, who takes care of the safety?

(Testimony of John D. Lundstrom.)

A. Yes; we have one on the water front; yes.

Q. Who was that in the gang; what was his name?

The Court: You are not close enough.

The Witness: Not in the gang.

Q. (By Mr. Roberts): You don't have one in the gang? A. No safety man in the gang.

Q. And you were in charge of the gang; is that right? A. Yes; I am.

Q. And who did you get your orders from, sir?

A. From the walking boss.

Q. I see. When you went to work on the morning of the accident, did you have to completely uncover number 3 hatch? A. Yes.

Q. Was that correct?

A. (Witness nods head.)

Q. And you uncovered all the way down to the lower 'tween deck? A. That's right.

Q. And you had some men down there?

A. Yes.

Q. What were you to load that morning?

A. We were to load lumber.

Q. And whereabouts were you going to [78] stow it? A. In the wings.

Q. In the wings of the lower 'tween deck?

A. Yes; lower 'tween deck.

Q. In order to store it in the wings, you had to use the hatch openings, you had to walk out on the hatch boards or hatch covers? A. Yes; sure.

Q. Did you start to work on the—did you ever start to work? A. No.

(Testimony of John D. Lundstrom.)

Q. Now, will you tell us why not?

A. When we came down there, that number 7 beam stuck up about four inches, four or five, something like that, and then I started looking around and discovered that number 1 beam was a little shorter, so I suggested we uncover both ends and change the beams around.

Q. Now, Mr. Lundstrom, before we go any further, did you and all the men in the hold discuss it just generally as to the safety factors; did all your men in the hold discuss the safety factors; they wouldn't work on it in that condition; is that correct?

A. That's correct.

Q. And did you discuss the matter with the walking boss?

A. Yes.

Q. And this was Mr. Burke?

A. Yes. [79]

Q. What did Mr. Burke say?

A. Well, he left it up to us to do whatever we pleased.

Q. I see. Well, isn't it a fact that he left the hold himself to go and get some dunnage or lumber?

A. He left the hold and went up on deck, and I don't know where he went. He went up, left the hold, anyway.

Q. Did he tell you what he was going to do?

A. I suggested that we put a floor of lumber on there.

Q. You had?

A. No; he did.

Q. And then he left it up to you as to whether you wanted to switch the strongbacks?

A. Yes.

(Testimony of John D. Lundstrom.)

Q. Why did you decide to switch the strongbacks?

A. Because we didn't think it was safe the way they were.

Q. Now, not talking about the strongbacks, but how were the hatch covers?

A. All bent out of shape.

Q. All of them? A. Well, most of them.

Q. And you were going to cover up the entire opening and the hatch cover with lumber, irrespective, even though you had switched the strongbacks in position; is that correct? A. Yes.

Q. And you eventually worked with that dunnage there? [80]

A. We did; we had a floor almost six inches thick.

Q. The entire length of the opening?

A. Well, there were some places that it didn't cover, it was too short, but some was long enough.

Q. And I understand that you turned some of the hatch covers upside down? A. Yes.

Q. Did the accident occur when Mr. Burke was out of the hold and away?

A. No; he wasn't there when the accident happened.

Q. He wasn't there? A. No.

Q. At whose orders were the strongbacks switched?

A. We took number 1 beam back to number 7 and took number 7 back to number 1.

Q. And was that done at your orders?

(Testimony of John D. Lundstrom.)

A. Yes.

Q. Was it done at the order of Mr. Burke or just your own?

A. Well, I don't know if it was by his order or not, but I done it.

Q. I see. He had left it up to you?

A. It's up to me to see that it was safe to work.

Q. And did you discuss—had you discussed with Mr. Burke whether to switch those beams before he left the hold?

A. I don't remember whether I did or not. [81]

Q. I am trying to get from you, Mr. Lundstrom, if you can remember, exactly what you had decided regarding switching the two beams, whether he had left it up to you and the gang or whether he told you to switch them?

A. Well, he left it up to us, to the gang, to do it.

Q. You didn't want to do it?

A. No; because we wouldn't work on the deck in that unsafe condition.

Q. So you were asking to switch the beams and put the lumber on top; is that correct?

A. We switched the beams and then we put the lumber on.

Q. Would you have put the lumber on top without switching the beams?

A. No; we wouldn't put the lumber on without switching the beams.

Q. Why not?

A. Because they was going to lift it up at one end and then put it down at the other end.

(Testimony of John D. Lundstrom.)

Q. Well, wouldn't the lumber put into the hold drive the beam into its proper place? A. No.

Q. No? A. I don't think so.

Q. I see. So you'd have to switch the beams anyhow before putting the lumber on; is that correct?

A. Certainly. [82]

Q. You didn't actually see the accident itself, did you? A. What?

Q. You didn't see the accident?

A. Yes; I saw him fall in there.

Q. Whereabouts were you standing on the deck?

A. I imagine about 15 or 20 feet from it.

Q. Mr. Lundstrom, will you go over there and put a big L where you were standing?

A. Yes, sir.

Q. Do you know in fact how many covers had been replaced at the other end when the accident happened? A. What is that?

Q. How many hatch covers had been replaced?

A. Well——

Q. Do you in fact know how many hatch covers had been replaced before the accident occurred; do you know how many hatch covers had been replaced at the after end of the opening before the accident occurred? A. No.

Q. You don't? A. No.

Q. You didn't see the hatch covers that fell into the hold——

A. Wait a minute now—did I see how many hatch covers there were before the accident happened——

(Testimony of John D. Lundstrom.)

Q. That's right. [83]

A. He had three on there.

Q. Which three?

A. The two on the first and then one on the second one and three—it can't be the fourth one.

Q. I see, and he was holding the fourth one; is that correct? A. That's right.

Q. Mr. Uskoski's diagram is substantially correct, then; is that correct?

A. That's correct.

Q. And the one that he was standing on was number 2; is that correct?

A. Well, I believe so.

Q. Did you actually see that number 2 fall?

A. Yes.

Q. You did actually see it; where was it when you first saw it? A. The hatch cover?

Q. Down in the——

A. Yes; down in the hold.

Q. Did you see it resting on the crossbeam?

A. I don't think I did; one went down in the hold with Swanson when he fell in.

Q. That's the——

A. The cover went with Swanson. [84]

Q. How many hatch covers went into the lower hold? A. Well, I couldn't tell you that.

Q. Were there any other hatch covers already down there before the accident?

A. Down in the hold?

Q. Yes. A. I don't believe so.

(Testimony of John D. Lundstrom.)

Q. Do you know where this ship was worked before; the last port?

A. They told me it was down at Coos Bay.

Q. Who usually covers up a ship like this and replaces the beams and the hatch covers; who usually does that, the longshoremen?

A. The longshoremen do; yes.

Q. All up and down the coast? A. Yes.

Q. Now, Mr. Lundstrom, did any of your men actually measure the crossbeams?

A. No; I don't think they did.

Q. Well, how did you know that the number 1 was shorter than number 7?

A. I could see it in the slot there when I looked. I saw a little opening.

Q. Oh, you say you saw a little opening at the number 1 slot? [85] A. Yes.

Q. And no opening at all in the number 7?

A. It wouldn't go down; it was very tight.

Q. I see. Do you know whether these crossbeams are, in fact, the same length?

A. Well, that I can't answer you, either.

Q. You don't know; you don't know whether you can interchange them, do you; by that, I mean you—— A. Sometimes.

Q. Can you put number 7 where you put number 1, and put number 2 where you put number 3?

A. Well, most of them are marked.

Q. Were those beams numbered?

A. That I can't answer you.

(Testimony of John D. Lundstrom.)

Q. How long have you been working on the water front, Mr. Lundstrom?

A. I been there 37 years.

Q. I see. When your men replace or cover up this type of a hatch with steel hatches, can you put one hatch cover on at a time and then stand on the coaming edge and slide another one along so that it slides all the way across?

A. What do you mean?

Q. When you cover up, instead of getting on the hatch cover itself in the process of covering, what is there to stop you from standing on the edge of a coaming, and [86] putting the first one on and then sliding the next one?

A. Well, we try to walk out with them.

Q. Why do you do that?

A. Well, sometimes they're so tight you can't slide them, you got to put them on one at a time.

Q. But you can slide them?

A. Sometimes you can.

Q. Can you stand on the coaming and slide them?

A. The only time you can slide them is on the first deck.

Q. Why can't you on the lower deck?

A. You got to bend out too much for that, you got to take them out.

Q. That's the only way you think you can do it?

A. Yes.

Q. Because you have to bend over too much?

A. That's right.

(Testimony of John D. Lundstrom.)

Q. Because of the coaming; is that the reason?

A. That's right.

Q. Because it's a little more uncomfortable that way?

A. I think it is.

Q. Although it would be safer though to slide it?

A. (No response.)

Q. Wouldn't it be safer to slide it from the hatch coaming?

A. If you can, yes. [87]

Mr. Roberts: I think that's all, Mr. Lundstrom.

Further Cross-Examination

By Mr. Wood:

Q. I will stand here so you can hear me.

A. You got to be closer to me.

Q. Am I on your best ear; which is your best side?

A. This (indicating).

Q. All right, I will stay here. Now, when you went down there to work that morning and you saw these hatch beams were not in the right place, you decided to change them, did you?

A. Well, we all met, me and the whole gang did.

Q. And did Mr. Burke help you decide that; was he there?

A. Well, he left it up to us.

Q. Was he there when you were talking about it?

A. Yes, he was down there when I was talking about it.

Q. And you decided to make the change?

A. Yes.

Q. And when you made the change, then the beams were all right, weren't they?

A. Yes.

Q. Now, why did you decide to floor off?

(Testimony of John D. Lundstrom.)

A. You mean——

Q. What do you longshoremen, when you are talking about flooring off, what do you mean? [88]

A. Well, we make a floor at the time, when we lower lumber until you come head-high.

Q. Well, you were going to build a platform of lumber across this hatch, weren't you; you were going to lay lumber across the hatch?

A. We were going to lay lumber all across to hold the hatch covers down.

Q. So as to hold them down?

A. To hold them down.

Q. Was that the only reason you had, to hold them down or so that you could walk on it safely?

A. Yes, because we was afraid to walk on them the way it was.

Q. In other words, you were afraid that one hatch cover might give away with you, but if you had the boards across there, that wouldn't happen?

A. That's right.

Q. Where did you get the lumber?

A. Got it from the docks.

Q. Where? A. From the docks.

Q. Did Mr. Burke go to get it, did Mr. Burke, the walking boss, go to get the lumber?

A. That's right; we loaded the same kind of lumber all the way through. [89]

Q. I see. You took part of the lumber cargo you were loading and made a floor across the hatch?

A. That's right.

Q. To make it safer? A. Yes.

(Testimony of John D. Lundstrom.)

Q. Do you quite often do that if you find hatches are not good?

A. That's the first one I ever struck.

Q. These hatches were in such condition that you thought you ought to put the lumber on top of them?

A. That's right.

Q. Did you have any discussion with the ship's mate at any time——

A. No.

Q. ——about the condition of the hatches?

A. No.

Mr. Wood: That's all.

Mr. Morrison: That's all.

Further Cross-Examination

By Mr. Roberts:

Q. Mr. Lundstrom, just a little more. As I understand it, your gang would still not work, not after you switched the beams; is that correct?

A. What?

Q. Your gang wouldn't work even after you switched the [90] beams until you had covered over the openings with lumber; is that correct?

A. It wouldn't work?

Q. Your gang wouldn't work?

A. Sure; after we got the lumber down.

Q. But you wouldn't do it until you got the lumber down?

A. No.

Q. And that was because of the hatch covers; is that correct?

A. That's right.

Q. Now, did you or Mr. Burke, to your knowl-

(Testimony of John D. Lundstrom.)

edge, ever advise the ship's company about this, or the mate?

A. I don't bother the mate; that's up to the higher ups to do that.

Q. But you didn't do it yourself; is that correct? You didn't?

A. I didn't bother the mate, no.

Q. Why didn't you just quit work there until you got different hatch covers? A. What?

Q. Why didn't you just quit work until you got proper hatch covers?

A. That wouldn't be any good; they still got the same kind of hatch covers on there yet.

Q. Well, this was just a matter of working, isn't it; [91] you wanted to get to work?

A. I didn't get you.

Q. I say you just wanted to get to work as soon as you could; is that it?

A. Well, we want to start to work when we can.

Q. I see. You could have stopped work and asked for new hatch covers from the ship's officers, couldn't you, or the mates?

A. Well, if I stopped, refused to work, then I would get in a jam by refusing to work.

Q. I see. Mr. Lundstrom, so you took your problem to Mr. Burke and then you decided to remedy it yourself; is that correct?

A. Well, Burke told me to make it safe and I tried to do my best.

Q. I see, sir, and this was done as far as you know without any knowledge or at least as far as

(Testimony of John D. Lundstrom.)

you were concerned the ship's officers did not know about this?

A. The ship didn't give any orders, no.

Mr. Roberts: That's all.

Mr. Morrison: There was nothing to prevent the ship's officers from knowing the condition of these hatches, was there?

The Witness: What?

Mr. Morrison: There was nothing to prevent the ship's [92] officers from knowing the condition of these hatches, was there?

The Witness: They must have known that.

Mr. Morrison: That's all.

The Witness: Couldn't help it.

Mr. Morrison: That's all.

(Witness excused.)

Mr. Morrison: Call Mr. Fants. [93]

JAMES S. FANTS

produced as a witness on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. How do you pronounce your name, please?

A. Fants.

Q. And where do you live, Mr. Fants?

A. 7130 Southwest 37th.

Q. And what type of work do you do?

(Testimony of James S. Fants.)

A. I am now a winch driver.

Q. How long have you been doing that type of work? A. 20 years.

Q. 20 years, and were you present on the day that this accident occurred? A. Yes.

Q. And were you a winch driver then?

A. Yes.

Q. And did you see the accident?

A. No; I did not see the actual movement of the man in the course of falling.

Q. On that day, did you have occasion to observe the condition of the hatch covers? A. Yes.

Q. What were the conditions of those?

A. They were very bad. [94]

Q. In what way?

A. Well, they were—these are made of quite thin metal, the top is thin and the bottom is corrugated, and they can't stand much of a jar, and in the course of loading ships they eventually all become bent and saucer-shaped and that is true with all these metal hatch covers.

Q. Are they used on many ships that come in here?

A. No; not many, and from the first day they come out, it was obvious that they were impractical and not a wise way of making hatch covers.

Mr. Roberts: Your Honor, this is the witness' conclusion, and it's already been admitted that the ships are manufactured with these steel hatches.

The Court: I don't see anything wrong with him giving his opinion.

(Testimony of James S. Fants.)

Mr. Morrison: Continue.

The Witness: I would like to say that this means quite a little to me, because I have participated in the attempt to get rid of these steel hatches, and it is—we have done everything except actually stop work and let the ships set there, which we, of course, don't like to do. It's common knowledge amongst our union people that we have all protested against them, we have used every method we could to get them removed and we have had assurances that they would be done away with. [95]

Q. (By Mr. Morrison): Well, now, let's get on to something else. Now, you don't—didn't consider them—you consider them dangerous then?

A. I do.

Q. And you say they are used on very few ships?

A. That's right.

Q. Did you know Guy Swanson before the accident?

A. Yes.

Q. Some little time?

A. I knew him ever since he came to the water front.

Q. And what kind of a worker was he?

A. Well, he is, in my opinion, a good worker and what we would refer to as kind of a spark. He was a little bit of a highball guy and he usually inspired the gang that he was working with.

Q. Now, have you had occasion to see him since this?

A. Yes; two or three times.

Q. And have you noticed any change in him?

A. Yes.

Q. What changes have you noticed?

(Testimony of James S. Fants.)

A. Well, he is not as agile in his movement around, like he did then, and he doesn't talk the same at all.

Q. Well, did you see a personality change in him?

A. Well, actually, I can't carry on a sensible conversation with him now. [96]

Q. And before that, before this accident, that did not exist?

A. He was just the same as any other person.

Q. Now, have you noticed any appearance, one witness has stated he had a glare in his eye; do you think he——

A. Yes; he doesn't have the same appearance that he did.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. You say you have seen him two or three times since the accident. When was that?

A. I have seen him around the hiring hall.

Q. How long ago was that?

A. Oh, I don't remember just what times. I think that he spends some time around the hiring hall, and I have just happened to run into him there. I haven't seen him for two or three months around the hiring hall.

Q. You haven't been in any conversations with him since this accident, have you, sir?

A. Oh, half-hour conversations.

(Testimony of James S. Fants.)

Q. You say he does not have the same appearance; is he thinner?

A. No; his weight isn't much different, I wouldn't say, but he certainly doesn't move around like an able-bodied man.

Q. Mr. Fants, you are an official of the local here? [97]

A. No; not at this time.

Q. You have been, have you?

A. Yes.

Q. And that's how you got interested in these steel hatch boards on the whole matter, wasn't it?

A. Yes; I have been very active in the union.

Q. Were you a member of the gang when this matter was discussed in the hold?

A. Yes.

Q. Were you down there?

A. No; I was on deck.

Q. You were on deck. You don't know what was discussed then, do you?

A. No; not exactly. It's common practice to fix things that are obviously not right. No one tells you to do that. Your experienced longshoreman merely proceeds and does it.

Q. Were there any ship's officers in this hold at this time?

A. I don't recall.

Q. Was any report made of the conditions of the beams, for instance, the short and the long beams to any of the ship's officers?

A. I don't recall.

Q. Do you know whether anyone in that gang or even the [98] walking boss had asked the ship's officers to switch any of the hatch covers?

A. I don't—I couldn't say definitely on that job,

(Testimony of James S. Fants.)

but I know personally that all these ship's officers are aware of the union protest from way back.

Q. These ships were manufactured with these hatch covers; weren't they?

A. I know there were many ships manufactured with them that have been replaced.

Q. Mr. Fants, were those manufactured during the war years? A. I don't know.

Q. Well, have you any idea why there are steel hatch covers of this type as opposed to the wooden ones? A. I imagine it was an experiment.

Q. Well, do you think it might have been a shortage of material?

A. No; I don't. I think probably these were made during the latter part of the war when steel was caught up fairly well. I don't know why they would make a steel hatch cover other than they thought possibly they would do better than wooden ones.

Q. In your experience on the water front, Mr. Fants, do you think you could replace those hatch covers, as I said, by sliding them along?

A. No. [99]

Q. Why not?

A. Because you can't bend over and touch your toes and push the weight of a hundred pounds.

Q. Do any of them weight a hundred pounds?

A. No, but you have to push more than one, you know.

Q. What do you think they would weigh, each of them, about?

(Testimony of James S. Fants.)

A. I have heard statements made here that they weigh 30 to 40 pounds, and I judge that's about right.

Q. Do you have any knowledge or idea as to about how wide that ledge is on the beam where they rest?

A. Between two and a half and three inches.

Q. How about on the hatch coaming side?

A. About the same, possibly a little less.

Q. The flange itself, how high is that above the crossbeam?

A. Well, I think it varies. I would say not over two inches.

Q. Usually about the same height as the hatch cover itself?

A. Yes, these metal hatches are thinner than the wooden hatch covers.

Q. Do these hatch covers sometimes get up on the flange itself?

A. Well, if you lay one in the place that it's supposed [100] to be, and one end rests on the beam, you'll naturally force it down or exchange it with one that will fit in there so that you can walk on it again.

Q. I mean in the manner in which you replace them, maybe you are in a hurry or something, and you didn't actually place it down in the slot?

A. Well, when we place it there, if you don't place it right, you change it to get it to fit in there right. You can't make it fit, you exchange it and get one that will fit, otherwise, you wouldn't come out and step on it.

Mr. Roberts: I see, that's all.

Mr. Wood: That's all.

Mr. Morrison: That's all.

(Witness excused.)

Mr. Morrison: Call Frank Novak. [101]

FRANK NOVAK

produced as a witness on behalf of the plaintiff and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. What is your name, please?

A. Frank Novak.

Q. And where do you live, Mr. Novak?

A. Milwaukie.

Q. What line of work do you follow?

A. Longshoreman.

Q. How long have you been a longshoreman?

A. About 23 years.

Q. Have you ever worked with Guy Swanson?

A. Yes, I worked with him quite a bit.

Q. What kind of a worker was he?

A. Very good, very agreeable, jolly.

Q. And how was his health?

A. He was in very good health before.

Q. Was he normal or was he—would you say he was an eccentric person?

A. No, he was just one—always went ahead and done his work and was jolly about it and joshing at

(Testimony of Frank Novak.)

the rest of us. They used to like to see him come in the gang to work because everybody agreed with him. It's easy to work with [102] a fellow like that.

Q. Were you working in this gang the day of the accident? A. No, I wasn't.

Q. How many times have you seen Mr. Swanson or talked to him since the accident?

A. I think I saw him twice in the hall, a couple times in the hospital.

Q. And during those times in the hall, did you talk to him?

A. Yes, I talked to him a little bit. He didn't have much to say and I didn't want to talk to him too much, I think it might embarrass him, so I didn't talk to him long. He seemed to be kind of down-at-the-mouth.

Q. Have you noticed any change in him?

A. Yes, there is quite a definite change.

Q. What have you noticed?

A. His appearance doesn't look the same, he must be—he used to be jolly and always a big smile on his face, and he don't carry that any more.

Q. And how does he talk; does he talk as sensible as he used to?

A. No, he doesn't. He don't talk not nearly the same as he used to. He is just a changed person, he is just down-at-the mouth, he don't know why.

Q. Have you noticed anything since on the two occasions [103] and I noticed that you talked to him today, have you noticed his conversation is a little strange?

(Testimony of Frank Novak.)

A. Yes, he just keeps talking about the same things all the time, and he kind of stares at you; he never done that before.

Q. You say now he stares at you? A. Yes.

Q. And talks about the same things?

A. Yes.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Mr. Novak, you didn't actually see the accident? A. No, I didn't.

Q. And were you working this day?

A. I wasn't on the job, I don't know where I was that day.

Q. I see. You weren't a member of this gang under Mr. Lundstrom? A. No.

Q. How many times do you think you had seen Mr. Swanson since he has been on the water front?

A. Pardon?

Q. How long have you known Mr. Swanson?

A. Oh, eight, ten years. [104]

Q. And did you used to see him very much other than when you were on the same gang?

A. Yes, I seen him quite a bit, I have went partners with him.

Q. Pardon me?

A. I have even worked partners with him when we worked down in the hold.

Q. I mean, have you seen him at any other times other than on the ships or at the union hall?

(Testimony of Frank Novak.)

A. I don't know what you mean?

Q. Well, was he a buddy of yours, did he go out with you? A. No.

Q. It was all during work?

A. I have ate with him and been in restaurants with him.

Q. You didn't visit one another's homes or anything like that? A. No.

Q. It was more an acquaintance from the union?

A. That's right, he was just a union brother is all.

Q. Did he discuss very many things with you?

A. No, nothing in particular.

Q. Did you know whether he had been married or anything?

A. No, I know he was going with a girl friend.

Q. Do you know whether he had been married previously? A. I don't know. [105]

Q. Did he discuss anything about his personal life before?

A. Yes, he told me, he discussed, I think, he used to work in the woods before he came up longshoring.

Q. Now, you say you have noticed a difference in him since the accident. In what way, the way he stares at you?

A. Yes. Well, he was just one of those guys, he'd come up to you and just talk to you and he was full of talk before the accident, and now he just—you just have to drag it out of him; if you want to talk you have to drag it out of him.

(Testimony of Frank Novak.)

Q. But he does talk to you, does he?

A. Yes, he will talk to you but not like he used to.

Q. And what he says is sensible, you can understand it?

A. Well, some of it, and some of it I wonder.

Q. You don't know what he is talking about?

A. That's right.

Q. And you say he is always talking about the same subject?

A. He keeps repeating all the time, he wishes he could go back to work and then just about things like that.

Q. Well, isn't that something you'd expect, a man that has been hurt in an accident?

A. Well, yes, but he still should talk about some better things in life than just work.

Mr. Roberts: That's all, sir.

Mr. Wood: That's all. [106]

Mr. Morrison: That's all.

(Witness excused.)

The Court: We will take a few minutes. This will be your last witness?

Mr. Morrison: This and one other. And if your Honor please, we had a doctor summoned for tomorrow morning, we might run out this afternoon. We proceeded a little faster than I anticipated.

The Court: All right.

(A short recess.)

The Court: Proceed.

Mr. Morrison: Call Mr. Swanson.

GUY W. SWANSON

produced as a witness in his own behalf and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. Now, your name is Guy Swanson?

A. Yes.

Q. And how old are you, Mr. Swanson?

A. I was born in 1902.

Q. You will have to speak up a little louder.

A. 1902. That would make me—this is '57—I am 55.

Q. Will you speak up a little louder?

A. Well, it's hard. I can't hardly get it out. I can't [107] hardly talk loud, I don't know what's the matter.

Q. Are you a little hoarse today?

A. No, I am not hoarse, I just can't get it out.

Q. Well, speak up as loud as you can, Mr. Swanson. Are you married? A. No.

Q. How long did you work as a longshoreman?

A. Well, I worked over 12 years.

Q. As a longshoreman?

A. Yes, I come—you know that three-week vacation, I did over 12 years. I don't know just how long.

(Testimony of Guy W. Swanson.)

Q. And what kind of work did you do before that?

A. Well, I worked in the woods and different places.

Q. And different places? A. Yes.

Q. And how far did you get along in school?

A. Well, I finished the eighth grade.

Q. And where were you born?

A. Mt. Vernon, Washington.

Q. Now, do you know about what time you reported for work on the day of this accident?

A. Yes, I even got the pad. I got the job at 7:45 at the hall, 7:45 and then I had to go to Terminal 4, and it takes you any way a half hour to go out there, so it was after 8:00 when I got there on the job, I know. [108]

Q. Were the other men working there when you reported? A. Yes.

Q. They were there when you got there?

A. Yes, I was the last one hired.

Q. Did they move those beams while you were there? A. Not when I was there.

Q. Were the beams moved before you got there?

A. I never seen any beams moved.

Q. You didn't see any moved?

A. No, I didn't see any moved.

Q. And were you the last one of the gang to get to work, did you say?

A. Yes, I was the last man hired.

Q. And who was your partner?

A. Clarence Uskoski, he was my partner.

(Testimony of Guy W. Swanson.)

Q. What type of—what kind of work then did you start doing when you got there?

A. Started covering up, putting the hatch covers on.

Q. Putting the hatch covers on? A. Yes.

Q. And do you know how many of them you had put on before this accident?

A. I don't know how many.

Q. You don't know how many?

A. No, I don't. [109]

Q. Now, how did you carry these hatches?

A. Well, you have one on each end, you know, a man at each end of the hatch cover. I'd have this end (indicating) and he'd have the other end and there is a little place, sometimes you can get your fingers in there, kind of a hole pressed in the steel and a bar across there, just enough to get your fingers in. Some of them you get your fingers in, some of them you don't. And other times you got to grab ahold of the ends, see?

Q. What were the conditions of these hatch covers? A. Well, they weren't too good.

Q. What do you mean by that?

A. They are never too good, the steel hatch covers are never level.

Q. They are never level?

A. No, they are not.

Q. And what causes that?

A. Well, if they're loading timbers and they got the timber a little heavy on one end and she comes down and the heavy end of the timber will hit the

(Testimony of Guy W. Swanson.)

hatch covers it's bound to spring them, hit them in the middle it's bound to spring them and both ends come up.

Q. And both ends come up? A. Yes.

Q. Now, were you carrying one of these hatches when this [110] accident happened?

A. Well, it happened so quick I don't even know when it happened, it happened too quick.

Q. You don't even know?

A. No, I don't even know.

Q. Have you any knowledge at all of falling down in this hold?

A. No. No, all I know is I woke up in the hospital later; that's all I know.

Q. And do you remember carrying this—do you remember carrying a hatch cover just before you fell?

A. I—well, we carried and put one in, I know, and then went back after another one and I don't remember after that.

Q. You don't remember anything after the accident?

A. No, I don't even remember a thing after that.

Q. And now, about how long did you stay in the hospital the first time?

A. The first time, it was the 9th of February when they took me to the hospital and then I got out—I have seen it at the doctor's office since, it was the 20th of March when I got out.

Q. When you got out, that's the first time you were in the hospital?

(Testimony of Guy W. Swanson.)

A. That's the first time, yes.

Q. Now, what's the first you remember in the hospital? [111]

A. All I remember is when I got out that morning, I know my girl friend, she——

Q. Were you unconscious when you went to the hospital?

A. Oh, I don't know a thing, I was dead.

Q. Do you remember when you woke up in the hospital?

A. Well, just wake up for a minute, then that's all, then you're back under again.

Q. And you're back under again? A. Yes.

Q. Now, do you remember being operated on?

A. I do the second time.

Q. You do the second time?

A. But not the first.

Q. But not the first? A. No.

Q. Did they bore holes in your head?

A. Yes, they drilled holes up in there, right there (indicating) there is a hole on each side.

Q. One on each side, will you point to those again?

A. Right up there (indicating) you can see them if you step up here, you can see them. There is dents in there, yet, right there (indicating).

Q. But you don't have any recollection of the first operation?

A. Oh, no, that's entirely blank to me. [112]

Q. How did you feel while you were in the hospital?

(Testimony of Guy W. Swanson.)

A. Well, you never had no feeling, you know, you didn't even know. Come to for a minute and then you're out, just like that (indicating).

Q. Now, after you left the hospital that first time, where did you go then?

A. Well, there was a fellow come up and I was going out, I don't even remember him coming up there, I was going out to his house. His name was Guy Jenks, and so my girl friend come up there, I think it was a Sunday morning when I was released, and here she'd been up there at 8:15, I think, I don't know, I can't recall back and tell you for sure, and here she was up there at 8:15 the next morning. She had my suit and my shirt and my shoes, and in the meantime the nurse had brought out my longshore clothes, they were cleaned, they had laundered them, you know, and I had them on and I was sitting up there waiting for her, but so much of it is a blank I don't remember, and then she says, "Come on," and so we went out and we thought this Guy Jenks was going to meet me out in front, so we waited there I guess a few minutes and she said, "Well, come on, we will go in my sister's car," and her brother-in-law, and I got over and got in their car, so they took me out to where Guy Jenks lived, he had my car parked in front of his place, took it from the Terminal 4 out there for safekeeping, so I went [113] in there—had a hard time getting up the stairs, you know, it's up an incline, went in there and this woman she was kind of nervous so my girl friend, she said, "Frank, take

(Testimony of Guy W. Swanson.)

him home over to your place," that's her brother-in-law, so I went over there and they kept me there four days and then it come to me all of a sudden just like that (indicating) that I had an apartment rented and then I decided I was going back to the apartment, and I told them to call Gilbert Dunn down at the Earle Hotel which they did and he came out and got me. She didn't want me to leave there, you know, so I told them to come from town out Hawthorne Street and I knew where the apartment was coming from town, but he drove the other way and stopped a block from the place and I happened to look and I seen the apartment down there, and I said, "That's where I live."

Q. Well, now, where did you go—before this accident had you rented that apartment?

A. I rented that the 5th of the month.

Q. And you rented it then four days before the accident? A. Yes.

Q. And you hadn't moved into it?

A. Well, I had moved my things over there.

Q. You had moved some things over there, but you hadn't started to live in that apartment?

A. No, not yet. [114]

Q. And then did you stay in this apartment then until you went back to the hospital?

A. Yes. I waited and went in for the second operation.

Q. Yes. A. Yes, I stayed there.

Q. Well, when you were staying there in that

(Testimony of Guy W. Swanson.)

apartment, how did you feel then between that time that you left the hospital until you went back?

A. Well, my eyes, they wouldn't close, you know.

Q. Your what?

A. My eyes wouldn't shut, couldn't shut them, blink them, you know, and I had to have something done I knew, and that's when I decided to go back to the hospital.

Q. Were you in any pain because of that?

A. Oh, yes, you have pain in your back all the time.

Q. I didn't hear that?

A. Pain in my back and my legs aren't the same all the time.

Q. Now, I am talking about the time between these two operations; what pain did you have?

A. I had a pain in my back, yes.

Q. And did that interfere with your walking around? A. Oh, yes, sir.

Q. In the apartment?

A. Oh, yes, very much. [115]

Q. Now then, when did you go back to the hospital again, do you remember that?

A. I don't remember, I think it was just about the first of the year. Now, it might have been a few days before the first of the year, that would be '56.

Q. '55, would it not?

A. Yes, '55; the latter part of '55, the first of—

Q. In December of '55?

A. I think it was, yes.

(Testimony of Guy W. Swanson.)

Q. Then how did you feel when you went back to the hospital; were you suffering any?

A. Well, yes, I was suffering.

Q. How were you suffering?

A. Well, my back and my head was tight, very tight.

Q. And you speak of your eyes; what was wrong with your eyes?

A. They feeled like they just stared, everybody said they wouldn't close.

Q. They wouldn't close? A. No.

Q. How long were you in the hospital then the second time?

A. Well, I do remember I got out the 18th of January, that is '56, the 18th of January, day after my birthday I got out.

Q. Now, what did the doctor do for you the second time [116] you went in the hospital?

A. Well, they drilled in that head again right there (indicating) them holes where they did the first time.

Q. Did they drill through the same holes into your head? A. Yes.

Q. The second time you went back?

A. Yes.

Q. But you say you remember that operation?

A. Well, yes, you can hear everything, you know, everything they were doing but it didn't hurt you, you know, they give you a spinal and then they—you can hear them cutting up there, hear everything, you know, but it don't hurt when they are

(Testimony of Guy W. Swanson.)

doing that. You'd think they was cutting on you it would hurt, but when they give you a spinal it don't hurt.

Q. But he did go through the same holes that he used before? A. Oh, yes, yes.

Q. And how did you feel after that operation?

A. Well, I got so I could—my eyes would blink, you know, they wouldn't stand wide open all the time.

Q. You got so your eyes would blink?

A. Yes, they'd blink.

Q. And how did you feel mentally; did you feel—while you were up there were you drowsy like you were the first time, or—— [117]

A. Well, you didn't feel, you didn't feel like you should, you know, not near. You couldn't feel good, you know, coming out from that operation.

Q. Do you remember the second time up there a Dr. Selling was called in for consultation?

A. Who?

Q. Dr. Selling? A. No, I don't.

Q. Do you remember you asking him if he didn't take care of a friend of yours a few years ago?

A. I don't remember that, no.

Q. You don't remember that doctor at all?

A. No, I sure don't, I sure don't.

Q. And you don't remember having any conversation with Dr. Selling up there?

A. I sure don't.

Q. Dr. Kloos was the doctor that operated on you?

(Testimony of Guy W. Swanson.)

A. Kloos, yes, he was the one that operated on me.

Q. Were you pretty sick when you were in the hospital that second time?

A. Oh, I don't know if it was sick or what, you know, just didn't feel like yourself, you know.

Q. You don't feel like yourself?

A. No, didn't have any strength to get up or go around like you should. [118]

Q. This hospital record shows you didn't get along with the barber very well up there; what happened up there on that?

A. Well, I guess he scared me.

Q. He scared you? A. Yes.

Q. How did he do that?

A. Well, when he—I never will forget that—when he come in to get me ready for the second operation——

Q. Speak a little louder.

A. When he was getting me ready for the second operation, he come in and I was asleep and he woke me up and held the razor out like that (indicating) and oh, boy, that scared me when I seen that razor up there, boy that scared me.

Q. Then were you still scared of him all the time you stayed in the hospital then?

A. Well, I wouldn't trust him too far, you know.

Q. You wouldn't trust him too far?

A. No.

Q. Now, after you came—the barber, you know,

(Testimony of Guy W. Swanson.)

at St. Vincent's Hospital, he is just a little fellow, isn't he? A. Yes, just a little fellow.

Q. A little fellow that weighs about a hundred pounds?

A. Yes, but with that knife, they could do a lot of [119] things with it.

Q. Now, after you left the hospital, how did you feel?

A. Well, I didn't feel too good, that's a cinch.

Q. And how have you felt since then?

A. My back and my legs are haywire.

Q. Your what? A. My back and my legs.

Q. Your back and your legs are, you say are haywire?

A. Yes, they give me a lot of trouble. Sometimes I think they are going out entirely. I can't walk right. If I had to get out in double time. I couldn't do it. If a car was going to hit me, I couldn't jump out of the way.

Q. How—does your back ache, too?

A. Yes, it's a steady ache back there.

Q. Now, at first when you first went to the hospital did you have severe headaches?

A. Yes, I used to have headaches.

Q. Those have cleared up, haven't they?

A. Oh, yes, yes, entirely.

Q. They have all gone? A. Oh, yes.

Q. You don't have headaches any more?

A. The only time that I have a headache is if I don't eat, see, like if I don't eat at night, then I get

(Testimony of Guy W. Swanson.)

worries, but otherwise if I eat and don't worry I am all right. [120]

Q. But the bad headaches that you had when you were first at the hospital, they cleared up?

A. They are gone.

Q. Have you been able to do anything since the accident? A. Not a thing in the world.

Q. Do you walk around very much?

A. I can't walk very much. I used to walk quite a bit, but I can't do it any more, it gets less and less all the time.

Q. And where do you spend your time?

A. I stay in the room most of the time.

Q. Stay in your room most of the time?

A. Yes.

Q. Is that in that same apartment?

A. Same apartment, yes.

Q. Where is that located?

A. 2238 Southeast Madison.

Q. Now, how about your legs; how do your legs affect you?

A. They feel like they're going to give out. They just feel numb. Sometimes they feel just as numb as—worse than when you are sleeping, you know, and you wake up. it's worse than that, it's different from that, it's just numb.

Q. Does that bother you when you step up?

A. Yes, it bothers me all the time. [121]

Q. Now, how about—you rode down here with Mr. Beebe in a taxicab this morning from our

(Testimony of Guy W. Swanson.)

office, does it bother you—how do your legs affect you when you got to step in an automobile?

A. Well, I can't step down, I got to let the cab or car pull away from the curb, then put my feet even with the tires and step up, but I can't step down. My back won't let me step down, but I can step where I got to raise myself up.

Q. Oh, you can raise your feet up, you can do that?

A. Yes.

Q. Now, how about your memory since this accident?

A. Well, sometimes it's good and then again it's just blank. Can't remember the way I should. I have to make notes of a lot of things or else——

Q. You say what?

A. I have to make lots of notes of things.

Q. Notes. Do you make notes and carry those notes around with you?

A. Yes, sure; I make notes, I have even got them in my pocket here.

Q. When you have an appointment or anything like that?

A. I put it down, yes, sure.

Q. And do you sometimes forget after you have had a conference with me? [122]

A. Well, yes, I don't know what makes that. I hate to admit it, but——

Q. What wages were you receiving—we have this account here from the Pacific Maritime, if the Court please, showing it's a little better than \$5,000 a year, and we wish to amend the pretrial order to

(Testimony of Guy W. Swanson.)

set down \$15,000 loss of wages instead of \$10,000. It's left blank, your Honor.

The Court: All right.

Mr. Morrison: We wish to put that \$15,000 loss of wages.

The Court: You may do that.

Q. (By Mr. Morrison): Your lost wages are about \$5,000 a year?

A. Yes, I made over that every year.

Q. Do you feel that you are improving any?

A. Well, if I am, it's awfully slow.

Q. What was that?

A. If I—I don't think I am, I really don't think I am. I hate to admit it, but——

The Court: Is he under a doctor's care now?

Mr. Morrison: I didn't hear that. Oh, he goes to doctors, yes.

The Court: Ask him.

Q. (By Mr. Morrison): Yes, I want to go into that. Now, what treatments have the doctors given you? [123]

A. They give me these therapy treatments for my back.

Q. Where do you take those?

A. I get them out at Providence Hospital.

Q. And is that the only treatment that you are under at the present time? A. Yes, yes.

Q. You have seen many doctors, haven't you?

A. Yes, I have seen many of them.

The Court: When was the accident?

(Testimony of Guy W. Swanson.)

Mr. Morrison: The 9th of February, '55, it's approximately two years ago now.

The Court: Has he been under a doctor's care all the time?

Mr. Morrison: If the Court please, I haven't been on this case very long.

The Court: Well, ask him.

Q. (By Mr. Morrison): Have you been going to doctors or under their advice all this time?

A. Well, going to them and they don't do anything for you, I go to doctors right along.

Q. But they don't—other than just physiotherapy, they don't do anything for you?

A. Oh, no, no, no.

Q. You went——

The Court: Who are going to be your medical witnesses? [124]

Mr. Morrison: Dr. Kloos is the doctor that operated on the gentleman. I am calling him in the morning, and he was sent also to Dr. Berg. Now, I might say that there was a sort of a misunderstanding there at first when he was taken in the hospital. Dr. Cherry saw him and he thought—he turned him over to Dr. Kloos because on account of the injury calling for a brain man.

The Court: Is Kloos a neurosurgeon? Is he practicing in an office; does he practice in a downtown office?

Mr. Morrison: Yes, your Honor, he is in the—on Johnson Street.

The Court: Who is he with?

(Testimony of Guy W. Swanson.)

Mr. Morrison: He is with himself, he is a neuro man and he was turned over to him and through a mistake we found, in talking—misunderstanding with counsel we understood they were going to call Dr. Davis who is a partner of Cherry's, so then we knew there was a misunderstanding some place, but he was sent to Dr. Richard Berg, who saw him several times.

The Court: Is Davis in Cherry's office?

Mr. Roberts: I think Mr. Morrison has got it mixed up, your Honor. I believe he was referred originally to Dr. Cherry because they thought it was an orthopedic question, then Dr. Kloos was brought into it right away. Dr. Cherry is with Blair, Thatcher, and Davis. [125]

The Court: Davis is not in that office?

Mr. Roberts: The Davis we have is with Livingston, so he has nothing to do with it. I knew that Dr. Cherry was going to be called, that's the reason I got Dr. Marxer for our doctor.

Mr. Morrison: Joe Davis is who we thought that they had called in, Joe Davis and we knew of the fact that he and Cherry were in the same office, and we knew it was a misunderstanding, and it was our mistake then, he went to Dr. Richard Berg.

The Court: Who are you going to call?

Mr. Roberts: Well, your Honor, I probably will be calling Dr. Marxer. He has treated him, and also the neurologist who examined him twice, and de-

(Testimony of Guy W. Swanson.)

pending on what Mr. Morrison does, I may even call his attending physician.

The Court: Who?

Mr. Roberts: Dr. Cherry, who for over a year took care of him, as I understand it.

The Court: Do you expect to call any medical testimony, Mr. Wood?

Mr. Wood: No.

The Court: Go ahead.

Mr. Morrison: We certainly would have had Dr. Cherry if it hadn't been for that misunderstanding. We thought that his partner had been called in on the other side, and [126] we figured it was undoubtedly a mistake, and that's why he was sent to Dr. Berg. You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Mr. Swanson, do you remember me?

A. No, I don't.

Q. You don't remember me taking your deposition in Mr. Murray's office?

A. No, I sure don't.

Q. And Mr. Stark was up there, you don't remember that?

A. I don't remember you, that's a cinch.

Q. Do you remember in that office though when somebody took your deposition?

A. It seems like I remember that fellow there (indicating).

Q. Mr. Wood, yes, he was there, too.

(Testimony of Guy W. Swanson.)

The Court: Well, he wears his hair the same, and you had yours changed.

The Witness: I think he said right next to me.

Q. (By Mr. Roberts): Well, this was on June 4, 1955. Do you remember that examination?

A. I remember something, I don't know.

Q. Well, they were all in Mr. Murray's office, and Mr. Wood and I both asked you some questions. That was in between your two operations.

The Court: Is his hearing good? [127]

Mr. Roberts: I think his hearing is all right.

The Court: If it isn't, you can sit in the jury box, if you want to.

Mr. Roberts: Thank you, your Honor.

Q. Mr. Swanson, you were born in Mt. Vernon, Washington? A. Yes.

Q. And you went through the eighth grade.

A. Yes.

Q. And have you ever been in Texas?

A. Oh, yes.

Q. When were you in Texas?

A. Oh, it's been years ago.

Q. How many years would you say?

A. Well, just offhand, I can't remember.

Q. Could it have been 10 or 15 years?

A. It's over ten years since I have been in Texas.

Q. What did you do?

A. I worked for a biscuit company there.

Q. And then did you come back to the Northwest after that? A. Yes.

(Testimony of Guy W. Swanson.)

Q. When did you first come back here, Mr. Swanson?

A. Well, I came here in Portland, I think, right about the war time.

Q. About the war time, did you work in the shipyard [128] during the war time?

A. No, I never worked in the shipyard.

Q. When did you work in the woods, before the war?

A. Yes, right—no, I think it was right—the first—the start of the war—I didn't stay very long.

Q. In the woods?

A. No, I didn't stay very long.

Q. Had you worked for Weyerhaeuser or somebody like that?

A. No, it's way up in Washington there, I've forgot the outfit.

Q. Do you remember when you first went on the water front? A. Yes, I do.

Q. When was that?

A. Well, I don't know the year, that's what I have been trying to figure out.

Q. Would it be 10 years ago or 15 years ago?

A. I been around 12 years on the water front.

Q. What were you doing immediately prior to that? A. Well, I had come out of the woods.

Q. Have you ever been married?

A. Oh, yes, sir.

Q. When were you married?

(Testimony of Guy W. Swanson.)

A. Oh, that's years ago, I was just a young fellow.

Q. How old were you?

A. That I couldn't say, it happened so far [129] back.

Q. I realize that, Mr. Swanson, were you 20?

A. Oh, I was over that.

Q. Between 20 and 30?

A. Yes, somewhere around there.

Q. And how long were you married, very long?

A. No, not very long.

Q. Have any children? A. No.

Q. Where were you divorced?

A. Well, I just got a divorce.

Q. Whereabouts? A. In Amarillo.

Q. In Amarillo, Texas? A. Yes.

Q. I notice on the hospital record there, you kind of indicated to Dr. Kloos that you thought your wife was trapping you or something?

A. Well, I don't even know nothing about that.

Q. You don't remember telling that to the doctor? A. No, I sure don't.

Q. Now, you had the accident on the 9th of February, 1955; is that right?

A. Yes, that's right.

Q. And you don't know anything about the accident? A. Yes. No, I don't. [130]

Q. Do you remember leaving the union hall at about a quarter to 8:00 and going down to the ship

(Testimony of Guy W. Swanson.)

and getting on the ship and that's all; is that correct? A. That's right.

Q. Do you know what happened to the hatch covers? A. I know we started to cover up.

Q. You don't know who you started to cover up with?

A. Clarence Uskoski, right back there (indicating).

Q. You heard him testify this morning, didn't you? A. Yes.

Q. And you heard him testify that you were down there when they uncovered, too?

A. Well, I don't know that.

Q. You don't remember that?

A. No, I got the job at a quarter to 8:00 and then by the time I got on there it was after 8:00.

Q. You don't remember uncovering?

A. No, I don't

Q. Do you remember replacing any of the hatch covers back?

A. I remember when we started to cover, yes.

Q. How many covers had you put back?

A. We hadn't put very many back, I know that.

Q. Then the accident happened?

A. Yes, that's right.

Q. But you don't know how it happened? [131]

A. I don't know how it happened.

Q. I think at the time I took your deposition, you told me that it occurred right—it occurred right in the middle of the hatch, didn't you?

(Testimony of Guy W. Swanson.)

A. I don't know, it's a blank to me.

Q. Do you remember your first hospitalization, when you first went to the hospital? A. No.

Q. Where did you go, to St. Vincent's?

A. Well, they took me in the ambulance, I don't know where they took me. I woke up in the hospital.

Q. And it was St. Vincent's you were later told, weren't you? A. Yes.

Q. And Dr. Kloos was taking care of you; is that correct? A. Yes, he was the doctor.

Q. How about Dr. Cherry; did he look at you?

A. I never saw him.

Q. You never saw him in the hospital?

A. No.

Q. Did you see any other doctors up there?

A. No, no.

Q. Dr. Kloos the whole time?

A. That's the only doctor I ever saw.

Q. Were you in a ward or a private room? [132]

A. Well, there was a bunch of men in there I understand.

Q. I see. A. I don't know how many.

Q. Do you remember what the first conscious thing was that you remember after the accident?

A. Just waking up for a minute, Dr. Kloos came in there one time and I was just waked up for a second, then you're out, you're blank from then on.

Q. I see. You were operated on that first time in the hospital; is that correct?

(Testimony of Guy W. Swanson.)

A. Well, I imagine.

Q. Two holes here in your head? A. Yes.

Q. When were you released from the hospital, the 20th of March?

A. I think it was the 20th of March, as near as I can find out.

Q. You don't remember what happened while you were in there? A. No.

Q. Do you remember any treatment that you had? A. No, I don't remember a thing.

Q. Or any of the doctors that looked at you?

A. No, no.

Q. Then you were released from the hospital?

A. I was released, yes. [133]

Q. Do you remember filing the complaint that you filed in this case, Mr. Swanson?

A. What do you mean "filed"?

Q. I mean the piece of paper that you have to file when you first sue somebody; do you remember signing that? A. I never signed nothing.

Q. You didn't sign anything like that?

A. I never signed nothing.

Q. Then you went back to the—went back to the hospital in December of 1955; is that correct?

A. Yes.

Q. And yet you don't remember me taking this deposition in June of '55?

A. I don't remember you, no, I don't.

Q. But do you remember a deposition being taken?

(Testimony of Guy W. Swanson.)

A. Yes, I remember this fellow right here (indicating), up there he sat right by me.

Q. That's Mr. Wood?

A. I think—I thought he was part of the stevedoring company.

Q. When you got out of the hospital, did any doctor treat you?

A. Well, I went up to Cherry, and then——

Q. That's the first time you went up to Dr. Cherry?

A. I don't—it's—I can't tell you if it was the [134] first time or what, but anyway the heat treatments on my back was out at Providence Hospital.

Q. Was that before you went back to St. Vincent's for another operation?

A. Well, I don't know right offhand, I don't know, you have got it down, you could tell, I can't.

Q. Well, I think—I am referring to page 31 of your deposition and on there I asked you, "What kind of treatments have you been taking, Mr. Swanson?" And you answered, "They gave me heat treatments, and they massaged them, and they have you lift your arms up and your legs up. They have you do some of it, see." And I asked you, "Are you wearing a back belt?" And you answered, "I am wearing a belt, a corset; I've got it on right now." Now that deposition was taken in the office of Mr. Murray on the 4th of June of '55. Does that refresh your recollection? A. Yes, I was there.

(Testimony of Guy W. Swanson.)

Q. "I see. But Dr. Cherry is taking care of you as far as your back injuries are concerned; is he not? Answer: Yes, he is supposed to be a back specialist. Question: He is an orthopedic (sic)? Answer: Yes." Now, you remember that, do you not?

A. Well, I don't remember every word.

Q. Well, not every word, but during that period he was taking care of you for your back and your other injuries? [135]

A. Then, I went out and the girl would massage my back and put heat on it.

Q. I see. Out at Providence?

A. Yes, Providence.

Q. Now, after you first got out of the hospital and around June of 1955 when you were getting this heat treatment and massage, how was your head feeling? A. June of—

Q. '55. How was your head. How did you feel then as far as your head was concerned?

A. Well, it was tight.

Q. Tight?

A. That's before I got the second operation.

Q. That's tight, Mr. Swanson?

A. Well, yes, it was tight.

Q. Having any headaches at that time?

A. Well, yes, I got headaches and my eyes, you know, they wouldn't close like, you know, blink like they're supposed to.

Q. Well, weren't you able to sleep that night?

(Testimony of Guy W. Swanson.)

A. Well, you see, for a certain length of time, yes.

Q. I see. Now, again, referring to your deposition, Mr. Swanson, on page 33, I asked you, "How often are you seeing the doctor for your treatments now? Answer: Twice last week, and I'll get it three times this week. I'll get it [136] Monday, Wednesday, and Friday. Question: That is these heat treatments— Answer: Yes. Question: —and exercises?" And I asked you, "Have you been getting any injections? Answer: No. Question: By the way, how does your head feel now? Answer: Well, I can't kick on that— Question: I see. Answer: —because he done a good job." At that time, you told me you weren't having any trouble with your head?

A. When was that?

Q. In June of 1955?

A. Well, I don't know why I went back to the hospital then, because it was tight.

Q. Well, maybe we can get to that a little further. I am just asking you if you remember telling me anything of that nature?

A. No, I don't.

Q. "You don't have any headaches— Answer: No. Question: —or anything like that? Answer: My head is very good." And on page 34, in the middle of the page, "Right on top of the head. Is that it? As far as you are concerned, now, your head is all right. Is that true? Answer: Yes. Question: You don't have any headaches or anything? Answer. No;

(Testimony of Guy W. Swanson.)

it don't bother me. My back and my legs is what is killing me." In June of 1955, you said your head wasn't hurting you, you had no headaches or anything [137] but your back and your legs were killing you at that time. Do you remember anything of that?

A. I don't remember nothing hardly, just it comes and goes, you know.

Q. During that period Dr. Cherry was taking care of you for your back; is that right?

A. Yes, I was going to him then, go out to the Providence Hospital and the girl would put heat on the back.

Q. Were you satisfied with the treatment that Dr. Cherry was giving you? Do you think he was helping you?

A. I got the treatment out at the hospital.

Q. Oh, I see, but he was prescribing it, wasn't he?

A. Yes, I'd like to have more of them.

Q. I see.

A. I'd like to have more of them, I'd like to have them right now.

Q. Also on this head business, Mr. Swanson on page 35 of your deposition I asked you, "You can use your hands, though? Answer: I can use them, but I haven't got one-tenth the strength in them. Question: I see. You are able to talk normally, I notice. Answer: Yes, yes. Question: I notice you are wearing glasses. Have you always worn those? Answer: Well, yes. Question: Do you have any trouble with your sensory organs like smelling— Answer: No. Question: —and taste? Answer: No, I

(Testimony of Guy W. Swanson.)

can [138] taste. Question: Your hearing?" Now, do you remember telling me all that in June of 1955?

A. No, I don't remember. I don't remember you, in fact.

Q. Would you say that that was wrong, that in 1955 you can't hear too well and you are——

Mr. Morrison: Now, just a minute, he hasn't testified—this witness has not testified there was anything wrong with his hearing.

The Witness: I can hear, I have heard good.

Q. (By Mr. Roberts): How about your smell?

A. I can smell, yes.

Q. Now, did anyone else see you in 1955 besides Dr. Kloos and Dr. Cherry?

A. Gosh, I don't know if anybody did or not.

Q. Did Dr. Kloos give you any further treatment once you got out of the hospital?

A. I got to go back up there a few times.

Q. What did he do for you, Mr. Swanson?

A. Just come in and went in the room and he looked at you.

Q. Talked to you? A. That's right.

Q. And then released you again; is that it?

A. Yes.

Q. And you went back in the hospital the latter part of [139] December of 1955; is that right?

A. I think that's right.

Q. How did you get back in that time; did you call Dr. Kloos, or who did you call?

A. I called the doctor, yes.

Q. What did you tell him, Mr. Swanson?

(Testimony of Guy W. Swanson.)

A. Well, I don't know to this day, I don't know what I told him.

Q. You don't know what you told him?

A. Then I got a friend of mine to take me up to the hospital.

Q. Did Dr. Kloos put you in the hospital then?

A. Well, the nurse put me in.

Q. I see. Do you know why you wanted to go back in the hospital?

A. Yes, I knew why I wanted to go back in.

Q. What was your reason at that time?

A. Well, my head was tight and as I said, my eyes couldn't go shut like this (indicating).

Q. Was that to the leader?

A. Yes, it was right up there (indicating).

Q. What do you mean by tight?

A. Well, just worse—people never had it, they don't know.

Q. Well, I can understand that, Mr. Swanson, but I want [140] you to testify. When you say it was tight, was there a pain in there?

A. Well, just tight—tight as a drum. It wouldn't even let your eyes——

Q. Blink? A. No, they wouldn't.

Q. You couldn't blink your eyes?

A. No, you couldn't.

Q. But were you having headaches?

A. Well, I don't remember.

Q. I see. Were you able to get around; were you living by yourself?

A. Just barely got around, I can get around

(Testimony of Guy W. Swanson.)

now, but I can't get around one-tenth as good as I used to.

Q. Who is taking care of you?

A. Well, my girl friend comes over and cooks meals part of the time; she takes care of her mother, too.

Q. Does she still do that, Mr. Swanson?

A. Yes, she still comes over.

Q. I mean very often? A. Yes.

Q. Who does all of your shopping for you?

A. Well, sometimes I go to the store, I do that.

Q. You live on the first or second floor of your apartment house? [141] A. I live on the second.

Q. And how do you get up there?

A. Well, I have to grab ahold of the stair rail and pull myself up.

Q. You can walk up the stairs all right?

A. By getting ahold of the rail, yes, and then brace the arm going up the other side.

Q. How long were you in the hospital the second time?

A. Oh, I got out on the 18th of January, the day after my birthday, I remember.

Q. January the what? A. 18th.

Q. 18th, 1956? A. I think it was '56.

Q. You were in that second time about two or three weeks? A. About.

Q. About three weeks?

A. About three weeks.

Q. Did you have another operation?

A. Yes, they operated on me.

Q. Who was that; Dr. Kloos?

(Testimony of Guy W. Swanson.)

A. Kloos done that.

Q. What treatment did Dr. Kloos give you?

A. Well, he drilled in my head there and I don't know what he done. [142]

Q. I mean, did he give you any injections or anything? A. No, no.

Q. He just made an exploratory operation and looked in your head?

A. Well, I don't know what they done, they drilled holes in there and went through it again.

Q. I see. Did you have any treatment to your back and your legs in the hospital the second time?

A. No, I wanted them to look at it and at my back, but this nurse, when I went in there, she said, "I haven't got orders to do that."

Q. I see. Did you tell Dr. Cherry you wanted some treatment on your back or Dr. Kloos?

A. Well, he referred me back to this Cherry in the Standard Building, he said he was a back specialist.

Q. Who; Dr. Cherry?

A. Yes, he said he was a back specialist.

Q. Did Dr. Cherry treat you again?

A. Never done nothing to me.

Q. Just kept you out for heat treatment?

A. Yes, that's all.

Q. Did you ever have any operation on your back? A. No, sir, no.

Q. On your legs or neck like that?

A. No. [143]

Q. Did you ever see any other doctors, Mr. Swanson? A. Yes—no.

(Testimony of Guy W. Swanson.)

Q. You saw two doctors for me, didn't you; Dr. Marxer and Dr. Davis; didn't you?

A. Yes, but they never done nothing.

Q. They didn't give you any treatment; they just looked at you? A. Yes.

Q. Did you have—did you see Dr. Raaf; do you remember Dr. Raaf?

A. No, I don't remember.

Q. Dr. Lucas or Dr. Chuinard? A. Yes.

Q. Did they treat you? A. No, no.

Q. They just looked at you?

A. Yes, just looked at me.

Q. Do you remember Dr. Berg whom Mr. Morrison just— A. Yes, I remember him.

Q. What did he do for you?

A. Well, I don't know what he did do for me.

Q. Did he give you any treatment?

A. Well, none as I know of.

Q. Did he look you over?

A. Well, he looked me over, yes. [144]

Q. Take X-rays?

A. I don't know if he took X-rays or not.

Q. You have been to quite a lot of doctors?

A. I have been to more than you can count on your hands and feet.

Q. Do you remember ever seeing a Dr. Dickel?

A. No, I don't remember him.

Q. Or Dr. Selling?

A. No, I sure don't know him.

The Court: I think we will put Mr. Pozzi on now

and maybe this examination can be finished tomorrow morning.

This is the other witness you were referring to?

Mr. Morrison: Yes.

(Whereupon, the witness, Guy W. Swanson, was temporarily excused.) [145]

FRANK POZZI

produced as a witness on behalf of the plaintiff and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. Your name is Frank Pozzi? A. Yes, sir.

Q. And you are a lawyer, are you not?

A. Yes, sir.

Q. Mr. Pozzi, how long have you known Mr. Swanson? A. Approximately in 1942 or 1943.

Q. And how well did you know him?

A. Quite well, I knew him as a fellow worker on the water front and I have known him as a lawyer.

Q. Did you work down there at that time?

A. I did.

Q. Did you work with him? A. Yes.

Q. And you have known him in your professional capacity as a lawyer? A. I have.

Q. And how was his general health before this accident? A. Very good, excellent.

Q. Was he a good worker?

(Testimony of Frank Pozzi.)

A. He is a fine worker, he is big and husky and strong.

Q. How was he mentally? [146]

A. Mentally alert, very congenial man to work with. Always willing to help the other man if you were having trouble or hard go, he would always step in and help.

Q. Now, since this accident about how many times have you seen him?

A. About—I believe three times. I have seen, I have talked to him, and additionally three or four times on the telephone.

Q. And then you talked to him on the telephone about three or four times and you have seen him about three times? A. Yes.

Q. Now, did you notice any change in his condition, say, since you first met him? A. Yes.

Q. What change?

A. Well, he is, in my opinion, incompetent as compared to what he was before the accident.

Q. How does he manifest that?

A. A number of ways. The first time I saw him after the accident, he was—well, he didn't even know me, and I have known him well, I have worked with him many times in the hold of ships, have played pinochle with him on the water front lunch hours, and so on, but since then I think the last time I saw him was about four months ago, approximately, and he had—feels that he is being persecuted. [147] Now, that's not like his normal character at all. Part of that time he called me by

(Testimony of Frank Pozzi.)

phone and suddenly started crying on the telephone. I had never seen him or heard him do that prior to the accident. Through his conversations, well, I can't tell what he told me, but in effect that people were trying to cheat him and that his lawyer was dishonest, meaning you, Mr. Morrison.

Q. Meaning me?

A. Meaning you and that he couldn't trust you any more. Those are some of the things.

Q. And the first lawyer, of course, there was——

A. The same thing occurred, of course, with his prior attorney. Also the same thing occurred with, I think, two different union officials of his union.

Q. That he figured that they were cheating him?

A. They were being dishonest.

Q. And that they were what?

A. That they were trying to cheat him and that he couldn't trust them.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Frank, you told us you knew Mr. Swanson, did you not, before this case, right after it was filed?

A. Yes, I have known him since, I think, 1942 or '43 when [148] he came on the water front. I think I was already there.

Q. You have done legal work for him; is that correct?

A. Yes, once, I believe he had a suit, a little

(Testimony of Frank Pozzi.)

problem with a suit one time, he came in to see me about it.

Q. Did he actually see you in a professional way as far as this case is concerned?

A. He attempted to, but I wouldn't talk to him about it in a professional way.

Q. Because another lawyer was involved?

A. Yes.

Mr. Roberts: That's all.

Mr. Wood: That's all.

Mr. Morrison: Is it not true that I have asked you to talk to him?

The Witness: Yes, it's been necessary fairly recently within the last few months because of his condition.

Mr. Morrison: You have been a sort of go-between between him and me?

The Witness: That's right, to try to keep him halfway under control.

Mr. Morrison: That's all.

The Court: How many witnesses will you have on liability, Mr. Roberts?

Mr. Roberts: No more than three, your Honor.

The Court: Will you have them available tomorrow? [149]

The Court: Will you have them available tomorrow and I will call my medical witnesses as soon as Mr. Morrison has called his.

The Court: Well, you don't expect to get through with all your medical testimony tomorrow, do you?

Mr. Morrison: Well, Dr. Cherry and Dr. Berg,

I think, will be gone for a week, but I can bring in the brain specialist, I will have him here tomorrow morning.

Mr. Roberts: If it's all right with your Honor, then, I will call my medical when he has got all of his medical in.

The Court: What?

Mr. Roberts: May I call my medical experts when he has all his medical testimony completed?

The Court: Yes, I told you yesterday about that. Will you have any witnesses on liability?

Mr. Wood: I don't expect to, unless something happens.

The Court: Well, we better be here at 9:30; it looks like we will have a great deal to do tomorrow. His cross-examination will have to be finished first.

(Whereupon at 3:35 p.m., February 5, 1957, an adjournment was taken until 9:30 a.m. of the following day.) [150]

Wednesday, February 6, 1957, 9:30 A.M.

Mr. Morrison: Call Dr. Kloos.

The Court: You want to do it this way rather than complete your cross-examination?

Mr. Roberts: Yes, your Honor. I will finish my cross-examination of Mr. Swanson later on, if it will be all right.

The Court: What are your views about that?

Mr. Morrison: It doesn't make any difference.

Mr. Wood: It is all right with me.

EDWARD K. KLOOS

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. State your name, please.

A. Edward K. Kloos.

Q. Are you a regulary licensed physician and surgeon? A. I am.

Q. How long have you been licensed to practice in Oregon, [151] Doctor?

A. Since the fall of 1947.

Q. And of what schools are you a graduate?

A. I graduated from the Western Reserve University in Cleveland, an undergraduate school; the University of Rochester School of Medicine and Dentistry in Rochester, New York, and I have a graduate degree from the University of Minnesota.

Q. Have you taken any post-graduate work?

A. Yes.

Q. What is that?

A. You mean internship and so on?

Q. Yes.

A. I interned at Strong Memorial Hospital in Rochester, New York, for a year, had a residency at Ogden Memorial Hospital in Elmira, New York, for a year, and had a three-year fellowship in neurological surgery at Mayo Clinic.

Q. Three years in Mayo Clinic in what?

(Testimony of Edward K. Kloos.)

A. Neurological surgery.

Q. In neurological surgery? A. Yes.

Q. When did you finish the Mayo Clinic?

A. I finished my fellowship there in '43, and then I stayed on on the staff in neurological surgery for about a year before I went in the service. [152]

Q. Then you were in the service? A. Yes.

Q. After you got out of the service where did you go?

A. I was in partnership in Denver for about six months before I came to Portland.

Q. You are a specialist, are you not?

A. Yes.

Q. In what? A. Neurological surgery.

Q. Are you on the staff of any local hospitals?

A. Yes.

Q. Which ones?

A. St. Vincent's, Emanuel, Providence, Holladay Park, Physicans and Surgeons, the County and University Hospital.

Q. Were you called in to treat Mr. Swanson?

A. I was.

Q. Following his accident. Who called you in?

A. Dr. Howard Cherry.

Q. Dr. Howard Cherry? A. Yes.

Q. What condition was he in when you first saw him?

A. May I refer to my notes here?

Q. Surely. A. He was comatose.

The Court: Who is this doctor practicing with?

(Testimony of Edward K. Kloos.)

Q. (By Mr. Morrison): Are you associated with anyone? A. I practice alone.

Q. And you restrict your work exclusively to neurosurgery, do you? A. Yes.

The Court: He is a member, of course, of the Medical Society?

Mr. Morrison: Yes.

Q. What medical societies do you belong to, Doctor?

A. I belong to the Multnomah County and Oregon State Medical Societies, and the American Medical Association, American College of Surgeons, Harvey Cushing Society, and the Congress of Neurological Surgeons and the Western Neurosurgeons Society and the North Pacific Society of Neurology.

The Court: I don't see how you can remember them all.

The Witness: I pay dues every year.

Q. (By Mr. Morrison): How long did this man remain unconscious in the hospital?

A. According to my notes and to the best of my recollection he was unconscious or semi-comatose until the 17th of February.

Q. And the accident happened on the 9th?

A. On the 9th, of 1955.

Q. Now go ahead and state what you found about his condition and what you did.

A. Well, he was comatose. There had been a history which [154] he was unable to give but apparently was obtained from others when he arrived

(Testimony of Edward K. Kloos.)

at the hospital, that he had had a head injury a short time before and had been comatose ever since.

On examination I found that he would move all of his extremities; that is, his arms and legs, if stimuli, painful stimuli, were applied, and that the pupils of his eyes reacted to light. Reflexes in his arms and legs were present, active and equal. Beyond that there wasn't much more of an examination that could be made, because the other parts of the neurological examination require the co-operation of the patient, and he was comatose.

Q. What did you do?

A. There was at that time no indication of a surgical condition being present. I felt that he had sustained a severe head injury with concussion and contusions or bruising of the brain, and that so-called conservative treatment, namely, supportive treatment, was all that was indicated. He was observed carefully with regard to his blood pressure, pulse and respiratory rate and given fluids intravenously, and so on, in order to try to help to repair the damage.

Q. Continue on with your treatment.

A. On February 12th I felt that he had deteriorated somewhat in as far as his level of consciousness was concerned, and he had developed by that time a positive Babinski sign [155] on the left side

Q. What is that?

A. That is an abnormal neurological sign which is produced by stroking the bottom of the foot. Normally the big toe bends or flexes, goes down,

(Testimony of Edward K. Kloos.)

but in the abnormal case or positive sign the big toe comes up, the other toes fan out, and it is definitely an indication of damage somewhere above the area where the nerve to the foot comes off the spinal cord. It can be either in the spinal cord or in the brain.

Q. Indicating damage either in the spinal cord or brain?

A. Yes. In view of that and the fact that he had deteriorated with regard to his level of consciousness, I felt there was a possibility of his having developed an acute blood clot over the surface of the brain, and that we had better investigate that. That was done by surgery on the same day, on February 12th.

Q. What did that surgery consist of?

A. That surgery amounted to the making of burr holes on both sides of the head and opening the coverings of the brain to see if there were any collections of blood underneath. None was found.

Q. That last part, Doctor, will you repeat that to the Court?

A. Opening the coverings of the brain to see if there were [156] any collections of blood beneath the coverings of the brain, between the coverings and the brain itself. None was found, and the possibility of his having developed a hemorrhage in the brain substance itself was considered, and therefore on the right side the frontal lobe of the brain was explored with a brain needle. And again no

(Testimony of Edward K. Kloos.)

blood was found; no gross collection of blood was found.

The Court: How long did this surgery take?

A. I will have to refer——

The Court: You can pick it up later.

A. Well, approximately an hour and a half to two hours.

The Court: Did you have an assistant?

A. Yes.

The Court: Who was your assistant?

A. One of the interns.

The Court: One of the interns.

A. I did note that there was a great deal of swelling of the brain, of the surface of the brain itself. It appeared to be tight with a lot of swelling, and I felt that in view of the continued swelling, which was five days after the injury, there must have been serious adhesions or a bruising of the brain substance.

The Court: The word you just used was “tight”?

A. Tight, a swelling.

The Court: Tight against the covering? [157]

A. Yes. Following the surgery Mr. Swanson's condition did not change, and was not expected to change inasmuch as nothing was found that was creating the pressure in his head other than swelling of the brain substance, and it would take time for that to clear up.

He remained comatose through the 16th of February, or at least semi-comatose. But on the 17th he appeared to be considerably improved. He was

(Testimony of Edward K. Kloos.)

speaking some and appeared to be awakening.

Do you wish me to go on?

Mr. Morrison: Go right ahead.

A. He remained more or less stationary, improving very slowly, through March 7th. He was then complaining of some headache. On March 11th, 1955, he suddenly became belligerent and very irrational, and it was felt that there may still have been something inside the head that had not been discovered at the time of the surgery and that he might have to have more surgery.

However, on March 15th, when the second surgery was scheduled, the night before he was so belligerent and irrational that he refused to allow his head to be prepared for surgery, and it was felt best that, in view of his agitated state, to cancel the surgery at that time.

By the morning of the 15th, however, he was again very much better, and he was apologetic. He seemed to be so [158] much improved that the further surgery was indefinitely postponed. He continued to improve markedly, and was discharged from the hospital on March 20th.

I saw him in the office on several occasions after that: On April 5th, on May 3rd—these are all in 1955.

Mr. Roberts: What was the last, Doctor?

A. May 3rd—I say, the dates are all in 1955—and May 24th. He was complaining of some discomfort in his low back, and I called Dr. Cherry as

(Testimony of Edward K. Kloos.)

an orthopedic surgeon, and he was to see Mr. Swanson shortly afterwards regarding his back.

I didn't see him again, then, I think it was, until December 29th, 1955, and he was readmitted to the hospital because he didn't feel just right. I have no specific notes as to the circumstances of his admission here, but, as I recall, he had called me up and my conversation with him was such as to make me feel that he had better be readmitted to the hospital when we could examine him again. At that time he showed some very definitely mental disturbance.

Do you wish me to go into that?

Mr. Morrison: Surely. Go right into that.

A. He had what psychiatrists characterize as delusions of persecution. He later indicated to me that he was sure that [159] the barber at the hospital was after him, and another individual or two were after him, or had ulterior motives of some sort with regard to him. It was felt on neurological examination at that time the only thing that he showed objectively was a questionable positive left Babinski sign, which he had had before. I felt that this was probably an acute psychosis, and Dr. Herman Dickel, a psychiatrist, was called in consultation.

The Court: Acute, you said?

A. Yes. Dr. Dickel felt that he had a psychosis——

Mr. Morrison: I don't believe you could testify, Doctor, to what Dr. Dickel's findings were; just your own.

A. Well, I felt that the problem was associated

(Testimony of Edward K. Kloos.)

with his intercranial injury, and that he may have in the meantime since he had left the hospital and over the period of months developed a chronic subdural hematoma or blood clot, which takes on a lot of fluid and grows over a long period of time, and that we should do an air study in order to try to settle this matter.

This was done January 4th, 1956, and revealed very poor filling or very poor distribution of air in the space between the covering of the brain and the brain itself over the surface.

Q. How is that done?

A. The patient is anesthetized, placed in a sitting position, [160] supported by an assistant, and spinal puncture needles are inserted in the low back and all the fluid is allowed to run out of one and replaced with air through the other needle until no more fluid is obtained. Then the needles are withdrawn, the patient is taken to X-ray, where X-ray films of the head are made. The air in there casts a shadow on the X-ray film and shows all of the spaces both in and around the brain as to their size, shape and position.

Q. Was that normal, did you say?

A. The cavities in the brain appeared to be normal, and there was very little, if any, air over the surface of the brain.

Q. What does that indicate?

A. Well, it sometimes indicates the presence of a blood clot which is located over the surface of the brain and has not allowed the fluid to come out and

(Testimony of Edward K. Kloos.)

the air to replace it. It sometimes indicates adhesions between the brain and the covering. It sometimes may mean nothing. It may simply mean that the brain was held up there by sort of suction and the fluid not allowed to come out.

At any rate, in view of the finding it was felt advisable to reopen the scalp over the old burr holes that had been made in the skull and check to see if there was anything there. I think we reopened that—yes, that was done, and in each instance there was a gush of fluid out of [161] each burr hole that did not appear to be abnormal in either amount or pressure. There was no evidence of subdural hematoma or the abnormal collection of clear fluid nor of adhesions or anything of that nature either. That was done on January 6th. The air study was done on the 4th. By January 12th, 1956, he had become very much depressed mentally, but he again cleared up and was able to be discharged from the hospital on January 18th. He was then seen subsequently on several occasions in the office, on January 24th and February 14th, at which time he stated that he no longer had any dizziness but he still felt generally weak. And on March 20th he said that his head felt fine but that his back was now bothering him.

He was to see Dr. Cherry again regarding the back. Then I didn't see him again until February 4th of this year, and at that time, according to his own evaluation, he felt that he was fine except for

(Testimony of Edward K. Kloos.)

his back as well as in the lower part of the chest he had some aching.

On examination then the objective neurological findings—one of them which I hadn't noted before was some atrophy or wasting of certain muscles in back of the right shoulder blade.

Q. That was just a few days ago?

A. That was just on the 4th, yes, Monday. He was always diffusely tender over the entire low back or lumbar region. [162] He had a bilateral positive Babinski sign. The toe response was abnormal on both sides.

Q. On both sides? A. Yes.

Q. Now?

A. Now. And he had a positive Hoffman sign, which is a similar thing with regard to the hands, the snapping of the fingers on the left side. All of these, the Babinskis and the Hoffmans, were only moderately positive, but they were definitely so, in my opinion.

My conclusions were that he had a low back strain, which Dr. Cherry was apparently evaluating or had evaluated, but that his major trouble was the residual of his head injury, and that this had resulted in a permanent brain damage.

Q. Is this anything that can be helped by treatment or time? A. I don't think so.

The Court: Will he get worse?

A. I don't believe I could answer that accurately. I think he may get worse. I don't think he will get better. I think he may get better on a

(Testimony of Edward K. Kloos.)

temporary basis, but I doubt that he will ever get up to what he was before his injury.

Q. (By Mr. Morrisison): Now, Doctor, I wish to refer you to two spinal fluid tests taken in the hospital, one taken on [163] December 31st, 1955, which appears in the hospital record as having been taken on that date, showing bloody fluid. Do you have that there? A. Yes.

Q. That was taken on December 31st?

A. Yes.

Q. And did that show gross bloody fluid in the spinal fluid? A. Yes.

Q. I will also ask you if that didn't show a positive Kahn, an indication of syphilis?

A. Yes; it had a positive sign.

Q. Then two days later did you take another spinal fluid test?

A. I took another one four days later.

Q. Or four days later. Did that show any positive sign? A. No.

Q. Did that show any indication of syphilis at all? A. No.

Q. Do you know whether he has taken blood tests since? A. Well, I believe he has.

Q. Yes. In any event, you didn't consider that he had it? A. No.

Q. What explanation do you make for that blood test, the bloody fluid that showed a positive reaction? [164]

A. Well, the spinal puncture was performed by one of the residents in the hospital and, as occa-

(Testimony of Edward K. Kloos.)

sionally happens, not only to a resident but to anybody performing one, the point of the needle may go through the covering of the cord which you are trying to just enter, go through that space, and part of the point, part of the bevel, enter one of the small veins around the coverings in the spinal canal so that you get both spinal fluid and blood from one of the veins into the needle. Then when these tests, the Kahn or other similar tests, such as Wasserman, and so on, are made they will not infrequently give a false positive.

Q. They will give a false positive?

A. Yes.

Q. Now, the second one, made four days later, was that made by you, yourself? A. Yes.

Q. That was made by you, yourself?

A. Yes.

Q. And it was perfectly negative as to that?

A. Yes.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. Do you think there was an error, then, Doctor, in that [165] positive finding on the Kahn test?

A. I think unquestionably that was a false positive.

Q. Did you know this gentleman, Mr. Swanson, was seen by Dr. Berg about in March of 1956?

A. I don't believe I have any record of that.

(Testimony of Edward K. Kloos.)

Q. And that Dr. Berg had given him some treatment for a leukocytic condition?

A. I don't know that.

Mr. Morrison: Now, Counsel, I think that the proper way would be to wait until Dr. Berg is called on. Dr. Berg gave that under a misapprehension of what he found up there in the hospital when looking over the records.

The Court: That can be presented in argument.

Mr. Morrison: We brought this to Counsel's attention by giving him that report.

Q. (By Mr. Roberts): Dr. Kloos, isn't it a fair statement that up until the beginning of 1956 you could not give any reasonable explanation for Mr. Swanson's present condition?

A. Would you mind repeating the question?

Q. You could not give any reasonable explanation of Mr. Swanson's condition up to about the beginning of 1956 from a neurological viewpoint, can you?

A. Oh, yes.

Q. Doctor, do you remember writing to Mr. Murray on January 10th, 1956? [166]

A. I think I have a copy of that here.

Q. I am quoting from the last paragraph:

"I believe that this man has a posttraumatic head syndrome accounting for his headaches and other symptoms, and I believe that there was some pre-existing mental condition accounting for his behavior, which probably was aggravated by his injury. I believe that this problem will be recurrent

(Testimony of Edward K. Kloos.)

and it may eventually require active psychiatric treatment.” A. Yes.

Q. That was in 1956? A. Yes.

Q. So at that time you thought Mr. Swanson's troubles were mental rather than any physical injury or brain trouble?

A. I said, “which probably was aggravated by his injury.”

Q. I see. What is the actual injury that you found to the brain? Would it be a condition of scarring of the brain?

A. I believe this man had severe contusions of the brain.

Q. Contusions? A. Yes.

Q. There is no pressure or anything like that into the brain itself, is there?

The Court: What do you mean by [167] contusions”?

A. Contusions are bruises. If they occur on the surface of the brain, there is a lot of—if you could look at it, there is a lot of blueness and engorgement of the vessels, an appearance comparable to a bruising or contusion of the skin of a part of the body. If it occurs in the substance of the brain—and I believe it would be difficult to say that it occurs only on the surface and not in the substance—there usually are innumerable minute, maybe microscopic in size, hemorrhages due to breaks of small vessels in the brain substance. They can be determined and found only if portions of the brain are removed for examination under a microscope.

(Testimony of Edward K. Kloos.)

Q. So, to summarize it, in your opinion, there are contusions of the brain?

A. I think there is no question he had a cerebral contusion.

Q. And that has been continuing there, Doctor?

A. Pardon?

Q. That has been continuing there?

A. This condition has caused permanent damage.

Q. Does that have any reaction as far as the rest of the body is concerned?

A. It depends on what parts of the brain it occurred in. Contusions can occur—if they occur in the part of the brain that, for instance, is in the motor area, the area that controls motion, there could be a paralysis and this [168] marked weakness resulting.

Q. Have you located any such damage to any of that particular part?

A. The indications in Mr. Swanson are that the contusions were more or less diffused and involving, to some extent, parts of the motor areas also to produce his positive Babinski signs which are involved in that manner.

Q. Doctor, did you know that on the hospital record it is indicated that on the 10th of February, 1955, Mr. Swanson fell out of his bed in the hospital?

A. I have no record of that in my records, but I have no reason to quarrel with what is in the hospital record.

(Testimony of Edward K. Kloos.)

Q. I read the hospital records last night, Doctor. I notice the nurse during the time he was in there the first time, up until the time of the operation, at least, keeps on using the word "lethargic" as to his condition. A. Yes.

Q. What does that mean?

A. Well, I used the term semi-comatose, and that can be in various degrees. The nurses frequently use the word "lethargic," but we don't very often.

Q. What is that?

A. It means very drowsy or stuporous. It can be to any degree.

Q. During this first hospitalization you had Dr. Philip [169] Selling, did you not?

A. Yes; Dr. Philip Selling. I discussed him with Dr. Philip Selling, I believe, on the 16th of February, 1955.

Q. What are spastic attacks?

A. It is an inco-ordination in which the muscles are also stiff and have increased tone.

Q. Was there any indication prior to the first operation of any spastic attacks?

A. I haven't made any mention of that in my records.

Q. You say you had Mr. Swanson as a patient through Dr. Cherry? A. Yes.

Q. Did Dr. Cherry treat him first or did you treat him initially? I notice the hospital records have all been crossed out that had Cherry on and your name substituted. A. May I explain?

Q. Yes.

(Testimony of Edward K. Kloos.)

A. I believe that Dr. Cherry is a member of a group of doctors, Blair, Thatcher, Davis & Cherry.

Q. Yes.

A. And a large percentage of injuries on the docks are sent to the hospital in their name.

Q. I see.

A. Because they are orthopedic surgeons, and many of these [170] injuries are of an orthopedic nature. Dr. Cherry was informed—I don't know whether by telephone or whether he was at the hospital—to see Mr. Swanson, but it was determined that this was primarily a head injury so he called me. Now, whether he had treated him first or not I doubt very much.

Q. Doctor, did you notice any injury or abrasion to either of Mr. Swanson's legs or in his waist area or in his upper chest?

A. Well, I don't recall, and I have no record of that in my own records.

Q. According to your direct testimony, however, he left the hospital and he seemed to be all right, did he? A. He seemed to be improving, yes.

Q. Then when you saw him on the 5th of April, on the 3rd of May and on the 24th of May, during that period did he have any trouble with his head? Was he complaining of any sensory loss?

A. This is in '55, you mean?

Q. Yes.

A. No. He said on the 24th of May that he felt that his head was all right.

Q. And he had back trouble?

(Testimony of Edward K. Kloos.)

A. But he was having back trouble.

Mr. Morrison: May of what year? [171]

A. Of '55.

Mr. Morrison: That is before the second operation? A. Yes.

Q. (By Mr. Roberts): Had he said anything about back trouble while he was in the hospital the first time? A. When he was——

Q. When he was in the hospital the first time?

A. No; not to my knowledge. But he wasn't saying very much about anything then.

Q. When he called you on the 29th, Doctor, what did he say was the matter with him? That he was just not feeling well?

A. Well, I can't definitely say that he called me, but I believe that that is how he got into the hospital. Now, whether he called me or whether he came to the office first and I admitted him to the hospital from there I can't be certain of. He was complaining of not feeling right. He said he had only occasional headaches and not recently. Then he went into the hospital, and when I talked with him after he had been admitted he spoke of his fear of the hospital barber and someone else. He was very much agitated about that particular situation.

Q. Doctor, do you remember writing a letter of March 22nd, 1955, indicating that Mr. Swanson had been to your office once or twice and that it might take another month or so before [172] he was able to return to work?

(Testimony of Edward K. Kloos.)

Mr. Morrison: What was the date of that?

Mr. Roberts: March 22nd, 1955.

Mr. Morrison: That was before the second operation?

Mr. Roberts: Yes. I think it was addressed to Gray & Lister.

A. Yes.

Q. At that time you thought he would be able to return to work?

A. I thought he would recover.

Q. And also on April 7th, 1955, you indicated that he had made a good recovery or was making a remarkable recovery from a mental standpoint but that he was weak physically and that it would be best for him not to return to work for at least another month and maybe even longer?

A. Yes.

Q. I think you wrote to Dr. Cherry on May 5th, 1955? A. I did.

Q. In that letter you indicated that you hoped he would be able to return to work some time within the next 60 to 90 days; is that correct?

A. Yes.

Q. Was it upon that second hospitalization that you formed the opinion that he would not be able to return to work; that is, to the work that he was doing? [173]

A. Exactly when I formed that opinion would be impossible to say, because that opinion is based on events with the passage of time and the general indication of lack of improvement, all of which

(Testimony of Edward K. Kloos.)

would indicate that the brain damage, organic brain damage, had caused some permanent changes which time alone could give you the answer to.

Q. Have you any opinion, Doctor, as to whether he has had any pain in his head?

A. On occasions he has had some headaches, and then on occasions he says he has none.

Q. You haven't examined him or given any opinion from an orthopedic viewpoint, have you?

A. No; I haven't.

Q. Who was the treating doctor from an orthopedic viewpoint from the time you had him under your care?

A. Dr. Cherry, I believe.

Mr. Roberts: I think that is all, Dr. Kloos.

Redirect Examination

By Mr. Morrison:

Q. Just one question, Doctor. Do you consider him permanently and totally disabled?

A. I do.

Mr. Morrison: That is all.

The Court: What do you mean by "totally disabled"? [174] Can he go back to work?

A. Yes. I don't think he could hold a responsible position because of the tendency for him to have these mental—or these acute or subacute psychotic episodes.

The Court: Could he go back to longshoring work where they work in teams?

(Testimony of Edward K. Kloos.)

A. I doubt it very much. I don't think he would be reliable.

The Court: Mr. Roberts?

Recross-Examination

By Mr. Roberts:

Q. As far as mental stability is concerned, you think that the injury may have aggravated some other condition that was already there; is that it?

A. I believe it is possible that he may have had a tendency to be unstable and that an injury such as this is enough to remove all the controls.

Mr. Roberts: Thank you.

Redirect Examination

By Mr. Morrison:

Q. Doctor, were you advised by anybody that knew him before of any instability prior to this?

A. I don't believe I was, no. [175]

Mr. Morrison: That is all.

The Court: That is all. Thank you, Doctor.

(Witness excused.)

FLORENCE BUNT

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. State your name, please?

A. Florence Bunt.

Q. Is it Miss or Mrs.? A. Mrs.

Q. Where do you live, Mrs. Bunt?

A. 80 Northwest Birdsdale.

Q. Do you work? A. Yes; I do.

Q. What do you do?

A. I am a practical nurse.

Q. Where are you employed? [176]

A. I am employed at Mrs. Sadler's Convalescent Home.

Q. Do you know Guy Swanson? A. Yes.

Q. How long have you known him?

A. 1946.

Q. Since 1946. Did you live near him?

A. Yes, we did. We lived at the Government units, Guild's Lake.

Q. About how long did you live near him?

A. We lived there about two and a half years.

Q. Now, what was his general condition during that time? A. He was very friendly.

Q. I mean his health.

A. His health was very good.

Q. How about his disposition?

A. Friendly.

(Testimony of Florence Bunt.)

Q. Friendly? A. A good neighbor.

Q. What is that? A. A good neighbor.

Q. What about his mental condition during that time?

A. I would say it was good at that time.

Q. Have you seen him since? A. Yes.

Q. About how many times? [177]

A. Oh, on different occasions in 1955.

Q. Have you noticed any change in the man?

A. Well, the first time I saw him after I moved out of Guild's Lake was in 1955 at Mrs. Sadler's. He come by one day, and we had a patient sitting on the porch and he was talking to him, and I was shocked at his eyes and his walk and his speech. It was incoherent.

Q. What do you mean about his eyes?

A. Glassy.

Q. Did he have that before? A. No.

Q. How about his conversation?

A. Well, it didn't seem to make too much sense to me.

Q. Have you seen him since that occasion?

A. Oh, a time or two.

Q. How was his conversation on those occasions?

A. Well, I would say he wasn't his self.

Q. He was not?

A. I would say there was a little mental condition there.

Q. Did you notice anything of that nature before this accident? A. Never.

Mr. Morrison: You may cross-examine. [178]

(Testimony of Florence Bunt.)

Cross-Examination

By Mr. Roberts:

Q. How many times have you seen Mr. Swanson since the 9th of March, 1955?

A. How many times since 1955?

Q. Yes. A. Oh, several times.

Q. What is several times, Mrs. Bunt?

A. Well, he used to take a little walk, and we would have this patient on our porch and he would walk by. I didn't see him every time, but occasionally.

Q. How many times do you think you have talked to him?

A. Oh, maybe a dozen times.

Q. About a dozen times? A. About.

Q. Do you know where he was living?

A. Well, I don't know the number of his apartment, but it was about a block and a half from where our institution is.

Q. Do you know whether he was taking care of himself or not?

A. You mean taking care of himself? That I wouldn't know.

Q. Of course, you don't know whether he could be a good neighbor now or not, do you?

A. Well, I haven't been in his apartment since we lived [179] out at Guild's Lake.

Q. Has he changed very much physically as far as his weight is concerned?

(Testimony of Florence Bunt.)

A. Yes. I went home and commented on it the first time I saw him. I was shocked.

Q. In what way?

A. Well, he just wasn't Swanson as far as I am concerned.

Q. I am talking about his weight. Has he lost any weight? A. Yes.

Q. You think he has lost weight?

A. He weighs less than he did when we knew him in Guild's Lake.

Q. You knew him in Guild's Lake in 1946?

A. That is right.

Q. Was he married at that time?

A. Not to my knowledge.

Mr. Roberts: That is all, Mrs. Bunt.

Mr. Morrison: That is all.

(Witness excused.)

(Short recess.) [180]

LOYAL BUROKER

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. Your name, please?

A. Loyal Buroker.

Q. Mr. Buroker, where do you live?

(Testimony of Loyal Buroker.)

A. Now I am living on a little farm between Troutdale and Gresham.

Q. Have you lived in this area for some time?

A. I have lived around Portland since 1941.

Q. What business are you engaged in?

A. Insurance sales.

Q. General insurance? A. Yes.

Q. Do you know Guy Swanson?

A. Yes; I do.

Q. Approximately how long have you known him?

A. I have known Guy a little better than four years.

Q. Did you see him quite frequently before this accident?

A. Yes; I did. We had some mutual friends and I saw him quite often.

Q. Did you have business dealings with him?

A. Yes. [181]

Q. Did you sell him insurance? A. Yes.

Q. What on?

A. I sold him insurance on his automobile, and shortly after that I sold him some insurance on a home that he was in the process of building.

Q. Was he in the process of building a home at the time when this accident occurred?

A. Yes.

Q. Do you know whether he later disposed of that home he was building?

A. I heard that because he couldn't complete it; he had to——

(Testimony of Loyal Buroker.)

Q. Well, never mind. You can't testify to what someone else told you. You sold him insurance on this home he was building before the accident?

A. Yes.

Q. Now, what was the condition of his general health before this accident?

A. As far as I observed, he was a normal individual; friendly. He was always very friendly with me.

Q. I mean his general health.

A. His general health seemed to be good.

Q. How about his disposition?

A. Perfectly normal, I would say. He was always friendly. [182] I got along with him very well.

Q. How about mentally? Did you notice anything odd about him before this accident?

A. Beg pardon?

Q. Did you notice anything odd about his mental characteristics before this accident?

A. No; I can't say that I did.

Q. Now, since the accident, have you noticed any change in his condition? A. Quite a bit.

Q. What is that change?

A. Oh, many times he has been quite irrational in his talk. He says someone is always giving him a bad time.

Q. You mean persecution?

A. Yes; I suppose that is probably what you would say. Always somebody who is—to sum it up the best I know how—trying to give him a bad time.

(Testimony of Loyal Buroker.)

Q. Did you notice him talking that way before the accident?

A. He never had. He never had to me, no.

Q. Does he walk around the same as he did before?
A. No, no.

Q. He doesn't. What do you notice different in that?

A. Well, I have seen times when he could hardly walk. I mean his gait is nowhere near what it was before. He walked like a normal individual who was doing a normal day's work, [183] and since that time a number of times that I have visited him he just couldn't get around as a normal man should.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. You say he gave you the impression that somebody was giving him a bad time since the accident?
A. Yes.

Q. Of course, he didn't have any litigation or anything pending before this accident that you knew of, did he?
A. No; not that I know of.

Mr. Roberts: I think that is all.

(Witness excused.) [184]

RUBY COITEUX

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Q. What is your name, please?

A. Ruby Coiteux.

Q. Where do you live?

A. 6109 Southeast 92nd.

Q. Do you work? A. Yes.

Q. By whom are you employed?

A. Stacey's Cleaners, machine presser.

Q. Are you acquainted with Guy Swanson?

A. Yes.

Q. How long have you known him?

A. Oh, about 13 years.

Q. Were you engaged to marry him before this accident happened? A. Yes.

Q. How long had you been going out with him before that, approximately?

A. I imagine about four months.

Q. But you had known him for a long time?

A. Yes. [185]

Q. Was he building a house at the time?

A. Yes; he was.

Q. At the time this accident occurred?

A. Yes.

Q. And had he rented an apartment just before the accident occurred? A. Yes.

(Testimony of Ruby Coiteux.)

Q. Had you planned this marriage in a short time? A. That is right.

Q. Has he since disposed of the house?

A. The house, yes.

Q. What was the condition of his general health before the accident?

A. I would say it was good.

Q. How about his disposition?

A. He had a very pleasant disposition.

Q. A pleasant disposition?

A. Yes; very pleasant.

Q. How about his mental condition?

A. It was good.

Q. Now, when he was taken home from the hospital the first time where was he sent? Where did he go? A. My sister's.

Q. He went to your sister's?

A. Yes. [186]

Q. Was there any incident that occurred while he was there about this apartment he had rented?

A. He couldn't remember that he had rented it.

Q. He couldn't remember that he had rented his apartment?

A. No. He would have went right straight home if he could have remembered it.

Q. But he had forgotten he had rented this apartment? A. Yes; he forgot all about it.

Q. Have you noticed any changes in him since?

A. Oh, all the difference in the world. He is just not the same person.

Q. Have you noticed any difference mentally?

(Testimony of Ruby Coiteux.)

A. Well, he seemed depressed.

Q. Have you noticed any difference in his conversation?

A. Well, he keeps repeating himself.

Q. You say he keeps repeating himself?

A. Yes.

Q. Have you noticed any tendency towards feeling that people have it in for him?

A. Well, he seemed to think everyone was against him.

Q. What is that?

A. He seemed to think everyone was against him.

Q. Was he that way before the accident?

A. Oh, no.

Q. How about his general appearance, the way he walks, his [187] gait? Do you note any difference in that?

A. Oh, yes. He can't—it is awfully hard for him to walk.

Mr. Morrison: You may cross-examine.

Cross-Examination

By Mr. Roberts:

Q. He has expressed some sort of, shall I say, animosity towards the shipping company and the stevedoring companies since the accident, hasn't he?

A. Well, I guess he sort of thinks they are against him, if that is what you mean.

Q. He sort of thinks they are against him?

A. Yes.

(Testimony of Ruby Coiteux.)

Q. And some of the doctors who have been engaged in treating him and even some of the lawyers?

A. Yes.

Mr. Roberts: That is all.

Mr. Morrison: That is all.

(Witness excused.) [188]

GUY W. SWANSON

the plaintiff herein, resumed the stand and was further examined and testified as follows:

Cross-Examination

(Continued)

By Mr. Roberts:

Q. How are you feeling this morning, Mr. Swanson? A. Oh, I don't feel very good.

Q. Pardon? A. I don't feel very good.

Q. Would you speak a little louder?

A. I don't know if I can. I don't feel good.

Q. You don't feel so good this morning?

A. No; I don't.

Q. Who has been taking care of you since the accident?

A. What do you mean, taking care of me?

Q. Are you living by yourself in your apartment? A. Yes; I am living alone.

Q. Do you cook your own meals and make your own bed? A. Not altogether, no.

Q. Do you eat out like most bachelors?

A. My girl friend comes over and cooks a meal once in awhile.

(Testimony of Guy W. Swanson.)

Q. Your girl friend comes over and cooks a meal sometimes?

A. She comes over pretty regular. That is what I should say.

Q. Do you eat out at all? [189]

A. No; I don't. I can't.

Q. How have you been living the last two years, Mr. Swanson? Have you been using your savings?

A. Why, certainly.

Q. I see. You have a bank account, do you?

A. No.

Q. Not now?

A. I pay for everything as I go along.

Q. Have you had any accidents since the accident on the boat, like falling down or anything like that?

A. Since the accident when I got hurt——

Q. On the boat. A. Since I got hurt?

Q. Yes. A. I haven't been on a ship since.

Q. No; I mean have you fallen down on the street or in your apartment?

A. No, no. I stay off my feet all the time.

Q. You have had no automobile accidents or anything like that? A. No, no, no.

The Court: Does he drive a car?

The Witness: No.

Q. (By Mr. Roberts): Do you drive a car?

A. No, no; I can't drive it. [190]

Q. Have you got a car?

A. I have got a car, yes.

Q. When have you driven?

(Testimony of Guy W. Swanson.)

A. I can't get in and drive it.

Q. You can't drive it?

A. The battery is run down, for one thing. It has not been started for a year and a half.

Q. But you have not been driving since the accident; is that right?

A. Well, I drove it once or twice, when I was getting therapy treatments. Then I might drive it once in a while, but since then I haven't.

Q. Do you wear glasses?

A. I do, but they don't fit me any more.

Q. Did you wear them before the accident?

A. Oh, yes.

Q. Just for reading?

A. I wore reading, and I had all-purpose glasses.

Q. All-purpose glasses?

A. But my all-purpose glasses don't fit me the way they should.

Q. Mr. Swanson, have you had any treatment from Dr. Cherry since the second time you were in the hospital?

A. He always sent me out for this therapy.

Q. Therapy treatments? [191]

A. Yes.

Q. That was for your back?

A. They put a heat lamp on my back.

Q. Where is the pain in your back?

A. On the lower part. It is the lower part, and then right through here and over (indicating).

Q. Right through your chest and right in the back?

(Testimony of Guy W. Swanson.)

A. I can't reach around—it is in the back and then over.

Q. Sometimes it will go over this way, to either side?

A. Oh, not so much over here. It is really over here, from here on over (indicating).

Q. From the middle over to your right side?

A. To the right side, yes.

Q. Are you able to lift your hands up?

A. Yes; I can raise them up.

Q. Can you write letters?

A. Well, I can write, yes.

Q. And sign your name?

A. Yes; but not nearly as good as I used to do it.

Q. How old are you now? 55?

A. This is '57, isn't it? I am 55, yes.

Q. I think you testified yesterday you go to the grocery store now to buy your groceries?

A. Yes; just around the corner.

Q. Do you usually walk? [192]

A. That is the only way you can get there.

Q. How did you get around in the recent snow and ice? A. I don't get out too much.

Q. When you did get out, did you get around all right?

A. I was awful careful. You had to be. I didn't want to fall down and hit my hip. One thing, they keep the sidewalks clean around there pretty much.

Q. Have you had any treatment other than Dr. Kloos and Dr. Cherry? Have any other doctors actually treated you, given you some injections or

(Testimony of Guy W. Swanson.)

some medicine? A. No.

Q. Has Dr. Berg given you any treatment?

A. No.

Q. None whatsoever? A. No.

Q. He just looked you over?

A. Just looked me over.

Q. How long did that take?

A. Well, I don't know. That I couldn't say.

Q. Have any of the doctors indicated that you should have an operation or anything on your back?

A. One doctor—I don't know who he is now—he says this was—is there a Dr. Raaf or somebody?

Q. Yes.

A. I was up to his office, and then he called some other [193] doctor in, and this doctor says, "Why don't you let Cherry operate on you?" Well, I never said a word. I never said a word.

Q. Who sent you up to Dr. Raaf, do you remember? A. No; I don't.

Q. Have you tried to go back to work, Mr. Swanson?

A. No; I can't go down—I can't even go down—they wouldn't even hire me at the window.

Q. Haven't you tried to do some work?

A. I can't do nothing. I know I can't do nothing.

Q. Have you tried other than knowing that you cannot?

A. I don't know what I would do. I went out here the other day and carried—I had a set of chains in the back of the car, so I got them out and

(Testimony of Guy W. Swanson.)

I carried them up to the room, and I didn't think I was going to get up there with them.

Q. A set of chains?

A. Yes; a set of chains, brand new ones, in the truck.

Q. Can you work down at the hiring hall or the dispatcher's office or anything?

A. You are voted in—you have got to be there and you have got to be voted in for them jobs.

Q. I see.

A. They don't appoint somebody. You are voted in.

Q. The union votes you in for that? [194]

A. Yes.

Q. Do you think you could do that type of work?

A. No; I don't.

Q. Why not?

A. Well, I can't stand somebody looking over me. They would run you ragged.

Q. You don't like to do that clerical office work?

A. No.

Q. Answering telephones?

A. You wait for them to take a job—I wouldn't have it when I was feeling good.

Q. You would rather do the physical work?

A. I would sooner do the physical work.

Q. Down in the hold?

A. Certainly. That is the best work there is.

Q. Pardon?

A. That is the best work there is.

Mr. Roberts: I think that is all.

(Testimony of Guy W. Swanson.)

Redirect Examination

By Mr. Morrison:

Q. Mr. Swanson, one thing I neglected to ask you: Were you building a house before this thing happened? A. Yes.

Q. You were? [195] A. Yes.

Q. Was it finished when this accident happened?

A. I just had the windows in and the doors and the shakes on. The inside wasn't finished yet.

Q. The inside was not finished?

A. No, no.

Q. You had rented this apartment and you were going to get married; is that right?

A. That is right; yes.

Q. Have you since sold this house?

A. I sold it, yes. It was standing there vacant, and I had to get rid of it, sir—somebody going in and out, you know. You can't trust people.

Q. So you sold the house since the accident?

A. Oh, yes, yes. I had no other way, you might say.

Q. The inside had not been finished?

A. Oh, no. I had to sheetrock two places in.

Q. Where was it located?

A. Right off of Glisan, a three-bedroom house.

Q. A three-bedroom house? A. Yes.

Mr. Morrison: That is all. [196]

(Testimony of Guy W. Swanson.)

Recross-Examination

By Mr. Roberts:

Q. One thing more, Mr. Swanson. Do you recognize the fellows who testified yesterday from the gang?
A. Yes; I knew those fellows.

Q. You knew all of them?

A. I knew all of the gang men, yes. I recognize this fellow here (indicating).

Mr. Wood: I wasn't in the gang.

The Witness: But you I can't recognize. I don't remember you.

Q. (By Mr. Roberts): You saw all of the fellows in the gang yesterday and you remembered them all?
A. Oh, yes.

Q. Mr. Lundstrom?

A. He was my boss, yes.

Q. The gang boss. And you remember your partner, Mr. Uskoski?
A. Yes.

Mr. Roberts: That is all.

Questions by Mr. Wood:

Q. Mr. Swanson, I think it is kind of a compliment to me. How do you happen to remember me and not this gentleman?

A. You sat beside me up there. [197]

Q. Did I?

A. I can remember you, but I can't him.

Mr. Wood: I see. That is all.

Mr. Morrison: That is all.

(Witness excused.)

Mr. Beebe: May it please the Court, Paragraph VI of the plaintiff's contentions, the damages were left blank because we had to get the medical damages and the medical expenses together. We would like leave to insert the sum of \$2,053.60 in Paragraph VI. It is my understanding that we have a stipulation——

Mr. Roberts: What is that, now?

Mr. Beebe: \$2,053.60. That if proper witnesses were called as to those expenses they would testify as follows with respect to the medical expenses:

Buck Ambulance Service, \$15.00—and that they were reasonable—Edward K. Kloos, \$225.00; St. Vincent's Hospital, \$581.95; St. Vincent's Hospital, \$296.30; Providence Hospital, \$38.50; Drs. Blair, Thatcher, Davis & Cherry, \$23.00; Coast Orthopedic Company, \$21.50; Dr. Corbin, \$35.70; Dr. Kloos, \$5.00; the Portland Clinic, \$25.00.

Now, your Honor, those that I have read total \$1,266.95. Those were paid by the stevedoring company, and [198] I understand that if there is a recovery here Mr. Swanson is obligated to reimburse them to that extent.

In addition to those, to Dr. Kloos for his second operation, the second time he went to the hospital, \$225.00; \$35.00 to Dr. Richard Berg; \$35.00 to Dr. C. Todd Jessell for X-rays; and a second hospital bill of \$491.65, St. Vincent's Hospital, covering the second hospitalization, or a total of \$2,057.60.

So stipulated?

Mr. Roberts: So stipulated.

Mr. Wood: Yes; we will stipulate, also.

Mr. Morrison: We rest, your Honor.

(Plaintiff rests.)

Mr. Roberts: Your Honor, I would like to make a formal motion in behalf of Oceanic Steamship Company for dismissal of plaintiff's complaint on the ground and for the reason that there is no showing by any preponderance of the evidence as to the means and the manner in which the accident occurred and whether it resulted indirectly or directly as a result of any unseaworthiness of the vessel or any negligence on the part of its operators, officers or owners.

The Court: Motion denied.

Mr. Roberts: Your Honor, the defendant will then call [199] Captain Cuthbert.

W. H. CUTHBERT

was produced as a witness in behalf of the Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberts:

Q. Would you state your full name, please?

A. Wilbur Henry Cuthbert.

Q. What is your present occupation, Captain Cuthbert?

A. At the present time I am Captain of one of the Matson ships.

Q. Which one? A. Hawaiian Retailer.

Q. When did that ship reach the United States?

(Testimony of W. H. Cuthbert.)

A. Monday, February 4th.

Q. And you came straight up here to the trial?

A. Yes.

Q. On the 9th of February, 1955, in what capacity were you serving?

A. I was Chief Mate on the Ventura.

Q. On the S.S. Ventura?

A. S.S. Ventura.

Q. Who owns and operates that ship?

A. The Oceanic. [200]

Q. It is a subsidiary of Matson? A. Yes.

Q. What kind of a vessel is the Ventura?

A. What do you mean, what kind of a vessel?

Q. Well, I mean what is her classification?

A. They call it a C-2.

Q. What trade was she in at the time, Captain?

A. Running on the Coast here and to Astoria.

Q. How long had you been on the Ventura prior to the accident which occurred the 9th of February, 1955?

A. A little over four years.

Q. And you were chief officer during that period?

A. Yes.

Q. Do you remember the day of the accident, or were you advised of the accident?

A. After it happened, yes.

Q. You never saw it yourself? A. No.

Q. Did any of your ship's officers or crew see or report it to you?

A. I don't remember whether any did or not. No one reported to me. I don't even recollect who it was that did tell me.

(Testimony of W. H. Cuthbert.)

Q. At any time prior to the accident had anyone from the stevedoring company reported to you or any of your personnel about any complaints about the hatch boards? [201]

A. No; no one made any complaint.

Q. This vessel was fitted with steel hatch covers; is that correct? A. Yes.

Q. Do you remember the port of call of the vessel before she came to Portland?

A. Yes; Yaquina Bay.

Q. Do you know who does your stevedoring for you down there? A. Independent.

Q. Was the vessel worked at Yaquina Bay?

A. Yes.

Mr. Roberts: Your Honor, I would like to hand the witness Defendants' Exhibit 56. It is admitted in evidence?

The Court: It is admitted.

Mr. Roberts: Thank you.

Q. Captain, that is a blueprint of the hatch system on the Ventura or the C-2 type ship; is that correct? A. That is correct.

Q. Did you have a similar sort of blueprint in your cabin on the vessel?

A. Yes, but this is a full size. It takes in the whole ship.

Q. You are familiar with that particular blueprint, are you, Captain? [202] A. Well, yes.

Q. What kind of hatch covers did you have in the lower 'tween deck on No. 3?

(Testimony of W. H. Cuthbert.)

A. What do you mean? We have already said they were metal hatches.

Q. They are metal hatches, are they?

A. Yes.

Q. What are the sizes of the hatches?

A. Well, we have two different—what do you mean? In each section?

Q. Well, in the hatch openings.

A. Well, in the upper section we have two different sizes, and we have the lower section, which is the section where the accident happened, and that has two different sizes.

Q. How many sections are there in the lower 'tween deck? A. There is eight sections.

Q. Can you tell us the measurements in feet or refresh your recollection by looking at the blue-print?

A. Well, I would say if we started from the forward end we have got a smaller sized section there. According to the plan here you have got a size there of—we call the hatches usually 24 inches wide, see, but they trim them down a little bit to fit them in, because the hatches—the width across is 20 feet, so they have got to narrow it down, so they run around $23\frac{7}{8}$ inches wide by 4 feet and $\frac{3}{4}$ [203] inches.

Q. By 4 feet what?

A. 4 feet and $\frac{3}{4}$ of an inch.

Q. Where is that?

A. That is in the forward end.

Q. Are you certain about that?

(Testimony of W. H. Cuthbert.)

A. That is the forward section. Here is the forward end, isn't it? One, two, three, four, five—you have got five sections.

Q. So they are $23\frac{7}{8}$ wide?

A. $23\frac{7}{8}$. That is what I say.

Q. How long are they?

A. Well, oh, they are four feet and three-quarters of an inch.

Q. Did you say three-quarters of an inch or three and three-quarters inches?

A. No; three-quarters of an inch, 4 feet no inches and $\frac{3}{4}$.

Q. How many sections are that size?

A. We have got one, two, three, four, five—five sections.

Q. That is in the forepart of the hatch; is that correct? A. Yes.

Q. What are the sections in the after part of the hatch?

A. Well, they are larger. I mean they are the same width, $23\frac{7}{8}$ inches, but they are larger and there is three sections of those, $23\frac{7}{8}$ by 4 feet $8\frac{3}{4}$.

Q. $8\frac{3}{4}$? [204] A. Yes.

Q. So there is a difference of 8 inches in the three after sections and the five fore sections: is that right? A. That is right.

Q. How many crossbeams in that hatch opening in lower 'tween deck No. 3? A. Seven.

Q. Seven. Is there a diagram or a sketch of that crossbeam on that blueprint?

A. What do you mean? It shows an end section.

(Testimony of W. H. Cuthbert.)

Q. Yes, but is there a separate diagram on there showing the specifications?

A. Yes; there is.

Q. Will you look at it, Captain? A. Yes.

Q. Have you found it? That is the lower No. 3 hold, lower 'tween deck? A. Yes.

Q. Is that correct? A. Yes.

Q. How wide is that particular beam?

A. You mean wide on the top side, I suppose?

Q. That is on the top side on which the hatches rest? A. Well, it is $8\frac{1}{4}$ inches.

Q. $8\frac{1}{4}$ inches. It so indicates on there? [205]

A. Yes.

Q. Does it indicate on there the thickness of the flange or the divider?

A. Yes. We usually call it the hatchboard spacing bar, and it spaces in between the hatches so they fit in there. Well, that is one-quarter of an inch.

Q. How high is that spacing bar?

A. That is an inch and a half.

Q. An inch and a half. Does that blueprint indicate the width of these steel hatch covers?

A. The width of them?

Q. Yes. A. Yes.

Q. What is the width?

A. An inch and three-quarters.

Q. An inch and three-quarters. Also, looking at the strongback or the crossbeam, whatever you wish to call it—what do seamen call those things? Are they strongbacks or crossbeams, or what?

(Testimony of W. H. Cuthbert.)

A. Well, we call them beams, ordinarily, when we—longshoremen say they beam up.

Q. Longshoremen call them strongbacks?

A. Well, they really call them—you can call them strongbacks. They are really hatch beams.

Q. They are hatch beams. And do the strongbacks fit into [206] your hatch openings?

A. Well, they fit into chocks here that are welded to the side of the hatch coaming on the inside. They call them slots, and so on, but actually they are chafing chocks.

Q. What is the measurement of the crossbeam or the strongback that fits into the chock? What is the dimension there?

A. You mean the part that goes in?

Q. That slides in, yes. What is the width of that, do you know?

A. What do you mean? How much it goes down, the depth?

Q. Yes. What is the distance there?

A. Oh, 9 inches.

Q. 9 inches. What is the actual measurement of the crossbeam itself? A. 10 inches.

Q. So there is a difference of one inch there; is that correct? A. Yes.

Q. So there is a 9-inch container and the crossbeam itself is 10 inches; is that correct?

A. Yes.

Q. So the crossbeam may be an inch above that—— A. Yes; it sits a little above.

Q. Captain, in your experience are these seven

(Testimony of W. H. Cuthbert.)

crossbeams or strongbacks interchangeable at this particular location? [207]

A. Yes; they are. We don't like to get them in the other hatches. As long as they stay in one hatch they are interchangeable.

Q. They are all the same length, though, are they?

A. They are supposed to be all the same length, standard length.

Q. Do you experience trouble sometimes in getting those in?

A. Yes; they will get jammed in there. Sometimes they get one end down a little bit farther than the other, and they get stuck in there. Because, after all, they are supposed to fit in there snug, you know.

Q. Who replaces those strongbacks or hatch boards after the vessel has been loaded?

A. The longshoremen.

Q. Do you ever get any debris down into the slots? A. Occasionally, yes.

Q. Would that keep the beam from going all the way in?

A. Some, yes. It depends upon how hard—it might be a piece of wood and it would crush down. It might be a piece of metal. It depends upon what they are loading.

Q. Captain, look at that blueprint again that you have in your hand. Can you advise the Court what the amount of play is in between the hatch dividing bar and the hatch board itself? You said the board

(Testimony of W. H. Cuthbert.)

in the after end is $23\frac{7}{8}$ by [208] 4 feet $8\frac{3}{4}$; is that correct? A. Yes.

Q. That board goes into an opening how wide and how long? Do the plans indicate that?

A. You mean where it fits into—on the bottom, where it fits in place, where it is made secure?

Q. Doesn't the blueprint indicate the length there?

A. Well, yes, it does. It gives a difference here of—the actual length is about—the board, we will say, the length is 4 feet $8\frac{3}{4}$. All right. The actual length there is 4 feet $9\frac{1}{2}$ inches.

Q. So you have got $\frac{3}{4}$ of an inch play there each time you put the board down; is that correct?

A. Yes.

Q. On the ship as it was constructed?

A. That is right. It is snug.

Q. Now, Captain, had you had any complaints from anyone regarding the hatch boards on the 9th of February, 1955?

A. No; not until it happened. Yes; after.

Q. After the accident had happened?

A. After it happened, yes.

Q. Had anyone drawn your attention to the fact that any of the boards were dished or were unsafe?

A. No; no one did. There was nothing said along the Coast. We had been using the same hatch boards along the Coast, although [209] we hadn't loaded that particular hatch. It was empty. We walked on it. They had been walking on it and putting them

(Testimony of W. H. Cuthbert.)

in and taking them out, and we had loaded the lower hold, but we didn't use the 'tween decks.

Q. You didn't use the 'tween decks until the lower hold had been loaded?

A. We had discharged during the voyage and there had been no complaints.

Q. Do you remember at the time you got to Portland what the headroom in the lower hold of No. 3 was?

A. Well, I call it 7 foot to the beams.

Q. 7 foot to the beams?

A. Yes; that is, under the beams.

Mr. Roberts: That is all.

Cross-Examination

By Mr. Wood:

Q. Captain, the Chief Mate of the vessel is the one in general charge of its equipment, is he not?

A. Yes, sir.

Q. And is responsible for its maintenance and repair, is he not? A. That is right.

Q. In pursuance of that duty he has to periodically inspect the equipment, doesn't he? [210]

A. Correct.

Q. Had you periodically inspected the condition of these hatch boards? A. Yes.

Q. How recently before this accident had you looked at them?

A. In the last port I had looked at them, in Yaquina Bay.

Q. At these hatch boards?

(Testimony of W. H. Cuthbert.)

A. Yes, at the time they were taking them off.

Q. So you knew their condition there?

A. I knew their condition, yes.

Q. There wasn't any reason, then, for the stevedoring company to tell you what their condition was?

A. Well, no. Sometimes they differed in what we think. We consider the hatches perfectly all right and they don't. So if they say so, why, we try to change them. We will change the hatch boards.

Q. Have you seen the pictures of these hatch covers that have been introduced in evidence here?

A. Yes; I have seen them.

Q. The dished condition that is shown on the photographs?

A. Well, dished, yes, is what they call it. But it isn't much, what we call——

Q. Whatever you call it, you have seen the pictures here?

A. Yes; I have seen the pictures. [211]

Q. And are they, according to your memory of these hatch boards, true representations of those hatch covers?

A. Yes. Well, there is hatch boards down there. Which ones they were I don't know. There is no marking on them to tell what part of the hatch they came from. They belong to the ship and they no doubt belong to that hatch.

Q. You knew they were in that condition, didn't you?

A. In what condition?

Q. As shown in the photographs?

(Testimony of W. H. Cuthbert.)

A. Well, I don't see anything bad about them.

Q. I am not talking about that. You knew that they were as shown in the photographs, didn't you?

A. Oh, yes. In that condition, yes.

Q. You had been on the ship for four years, hadn't you? A. Yes.

Q. As Chief Mate? A. Yes.

Q. And were, of course, responsible for these hatch covers? A. Yes.

Q. Had you ever replaced any of them?

A. Oh, yes; many times.

Q. How recently before this accident had you replaced any of them at this hatch?

A. At this hatch—oh, I don't know. I couldn't say how often we did. I keep spare ones on [212] hand.

Q. Now, you said that the hatch covers on the three after sections were longer by about 8 inches than those on the forward five sections?

A. Yes, they were longer.

Q. Were these hatch covers numbered in any way, as I know they are on some ships, to denominate which sections they are to go into?

A. Some of them were. You try to keep them numbered, but they were off.

Q. In this instance do you know whether they were numbered or worn off?

A. No, there was no numbers on them.

Q. You spoke of the crossbeams being all of equal length and supposedly interchangeable. You

(Testimony of W. H. Cuthbert.)

were referring to the blueprint showing when the ship was built, weren't you?

A. I am referring to my experience on the ship there, knowing that they had been moved around, and also from the blueprint, of course.

Q. If one of the crossbeams got a little bit sprung, as I know they do—— A. Yes.

Q. ——or if the hatch coaming at either side got slightly bent, even by as much as a half an inch or a quarter of an inch, one of the beams might not fit in that location and it might have to be changed; isn't that true? [213]

A. Changed in what way?

Q. Well, taken out and another one put in its place?

A. Well, a beam would have to be changed or none of the rest would fit it, if that was the case. They are all the same size.

Q. They should be, but with the battering around the hatch that a ship gets in so many years, the hatch coaming or the beams don't always remain true, do they?

A. Well, they seldom get out of line. Other parts will get bent before the ends of them. But they do get sprung once in a while. I admit that.

Q. Did you as Chief Mate keep track of the loading at Yaquina Bay and what the longshoremen did?

A. No. We have a cargo boatswain. The second officer, he keeps track of the work along with the supercargo and the loading bosses.

(Testimony of W. H. Cuthbert.)

Q. I understand your supercargo is going to be here as a witness; is that right?

A. I think so.

Q. Do you know yourself whether the Independent Stevedoring Company at Coos Bay covered up this No. 3 lower 'tween-deck hatch?

A. I believe so. They was our stevedoring company.

Q. Do you know whether they were working that hatch? A. Yes. [214]

Q. You know that?

A. I know they were working that hatch, yes.

Q. They were working cargo in through that hatch? A. In the lower hold.

Q. Are these hatch beams when they are put in place always uniformly dead level, or sometimes does one stick up a few inches, as happened in this case?

A. Not a few inches, no. There might be a little chip in there or something, but anything that sticks up a few inches is not going to——

Q. You mean a little debris?

A. A little debris, yes.

Q. Did you have any conversation with the walking boss or the gang boss on the Ventura before the accident?

A. No, I don't remember having any. They might have talked to me during the loading of the ship, but I don't recall any single conversation.

Q. Was this the first day's loading of the ship?

(Testimony of W. H. Cuthbert.)

A. I couldn't say. I don't remember whether it was or not.

Q. Did you inspect the covering up of the hatch at Yaquina?

A. Not the covering up. I was down there when they took them off and checked up the hatchboards. It was one of the other officers checked that, or I presume he did. [215]

Q. At Yaquina? A. At Yaquina, yes.

Q. You mean he checked the covering up?

A. I think so, yes.

Q. It is the right of a Mate at any time he sees stevedores doing work on a ship that he doesn't approve of to stop the work, isn't it?

A. That is right, yes.

Q. And no Mate stopped the Portland Stevedoring Company in its work at covering up this hatch before the accident, did they?

A. What do you mean, stopping work before the accident?

Q. I mean when the Portland Stevedoring Company, as indicated by the testimony here, replaced the hatch beams and disposed them, made them all level, and then were putting in the hatch covers and were going to cover the whole thing with lumber, no Mate of the vessel disapproved of that operation, did they?

A. No, I don't think any Mate of the vessel knew about it.

Mr. Wood: No. Maybe not. I think that is all for the present, at least.

Mr. Morrison: I have no further cross. [216]

(Testimony of W. H. Cuthbert.)

Redirect Examination

By Mr. Roberts:

Mr. Roberts: Your Honor, I would like to see Pretrial Exhibits 41-A, 41-B, 41-C and 41-D. I would like to let the Captain look at these, your Honor.

The Court: Yes.

Mr. Roberts: They are admitted into evidence.

The Court: Yes, they are in.

Q. (By Mr. Roberts): Captain, will you look at those exhibits. Are they fairly representative of the hatch covers in the hold? I am not saying they were the ones that were involved in this accident.

A. What is it you want to know?

Q. Are those fairly representative of the hatch covers that you saw after the accident?

A. Yes, only in a different position.

Q. I see. Would you look at the one that is lying down on the steel pontoon. That board is dished at one particular end or one corner how high, would you say?

A. Well, one corner here looks about one inch—well, it is hard to judge here, to say what it is. It is more than an inch, but not much more than an inch.

Q. Those hatchboard covers are $1\frac{3}{4}$ inches wide? The width of the hatch covers is $1\frac{3}{4}$ inches?

A. $1\frac{3}{4}$, yes. [217]

Q. Have you ever seen a longshoreman place those covers back on a strongback?

(Testimony of W. H. Cuthbert.)

A. I have never paid much attention, no. I have seen them, yes, but just to see the finishing up, that they were in right, or something like that.

Q. Captain, as I understand your testimony, at no time prior to the accident had anyone brought your attention to this trouble in the No. 3 hold as far as the workmen complaining about the surface on which they were working; is that correct?

A. Nobody had informed me or complained about it previous to the accident.

Q. That hatch, you think, had been worked at Yaquina. Had you had any complaints there?

A. No complaints, no.

Q. You heard the testimony that the after beam on the No. 7 strongback was about 4 inches out; is that right? A. Yes.

Q. That would put it nearly halfway out of its retaining slot, wouldn't it?

A. A little less than half.

Q. A little less than half. Do you know whether, if that proved to be the fact, the hatch covers would still have a support to lay on?

A. You mean on that slot, when it is slanted that way? [218]

Q. Yes.

A. I don't know now whether——

Q. It would be pretty precarious, wouldn't you say?

A. Well, yes. You would consider it would bring it back about 2½ inches, the way I figure, anyway, about 2½ inches, back from the ends or 3 inches.

(Testimony of W. H. Cuthbert.)

Q. Had you seen the longshoremen of the Independent down at the Coast working on your ship before, the Ventura, on your previous trips?

A. You mean working on the ship?

Q. Yes.

A. Independent longshoremen? Yes.

Q. Had you ever seen any of them leave a beam out 4 inches, out of its slot? A. No.

Q. Do you think they would have done it?

A. Well, I don't know. It is rather odd that they would. I can hardly picture them doing it now.

Q. It is just too far out?

A. 4 inches, that is too far out. The main thing is they have to work the hatchboards the same as any other place.

Q. You have seen a beam, though, out of its slot a slight distance, but never as much as four inches?

A. No, no.

Mr. Roberts: That is all. [219]

Mr. Wood: I would like to ask a question about that.

Recross-Examination

By Mr. Wood:

Q. Even if the beam was 4 inches high, the hatchboards did fit in their place, didn't they?

A. No, it wouldn't exactly. It couldn't possibly fit in their place if it was that far away from the hatches.

Q. They may not fit as snug, but the hatch was all covered up with them when the ship arrived in Portland, wasn't it?

(Testimony of W. H. Cuthbert.)

A. Yes, they were covered up.

Q. So they were fitting into place; they weren't falling through, were they?

A. All right, but you have got your beam up that high.

Q. 4 inches.

A. Your hatches come down like that. All right, you have got your flange on each side. Well, then your hatches slant down. They are going to come down on this side.

Q. But they will still stay there because the lips on the crossbeam and the coaming are still wide enough to catch the ends of the hatchboards?

A. Yes, they have got an inch or so.

Q. I wanted to ask you one final question: You have been on that ship four years up and down the Coast here, haven't you? [220]

A. Yes.

Q. Hadn't you had from longshoremen and stevedoring companies previous complaints about these hatch covers?

A. About metal hatch covers, yes.

Q. Many of them?

A. Yes. No matter what condition they were in, why, they complained about them.

Q. Didn't they complain about them particularly on the Ventura because they were dished and bent?

A. No.

Q. They didn't like them?

A. No, they weren't complaining about that.

Q. What were they complaining about?

(Testimony of W. H. Cuthbert.)

A. Just didn't want metal hatchboards.

Q. Why not?

A. Well, they didn't figure they were safe for some reason or other.

Q. That is it.

A. They had that idea. I don't know. If they were good enough for the Navy they were good enough for the Merchant Marine.

Q. How long had these complaints of longshoremen and stevedoring companies against their safety been going on?

A. Oh, I don't know how long. It is on occasions. It is not continuously. Every now and then someone makes a complaint. [221] Now the two places is Los Angeles and in Portland occasionally; not always in Portland but occasionally. They are usually in Los Angeles. Those are the only two places we get complaints that I know of.

Q. This is a fair statement, isn't it: That there have been more or less continual complaints about those hatch covers? A. Not continuous, no.

Q. I don't mean every week, but I mean every so often throughout the course of the four years you were on her somebody was kicking about those hatch covers, weren't they?

A. Yes, they kick about wooden ones, too.

Q. I know, but weren't they more objecting to these metal ones because they didn't consider them safe?

A. Well, what they considered them I don't

(Testimony of W. H. Cuthbert.)

know, but they did complain, I admit that, in those two places.

Q. There were more complaints about these metal ones than there ever were about wooden ones, weren't there?

A. Well, yes, there was. They don't break as easy as the wooden ones.

Q. But they bend easier?

A. They bend easier, yes. They bend, but they don't break up as easy.

Mr. Wood: That is all.

Q. (By Mr. Morrison): These complaints about the metal ones, whether they were justified or not in making such complaints, [222] their complaints were that they didn't consider them safe, weren't they?

A. That is what they stated, yes.

Redirect Examination

By Mr. Roberts:

Q. One more question: So that the Court may understand, they were not complaining necessarily about the condition of the hatch covers; they were complaining because they were metal; is that right?

A. Yes, that was the main complaint, because they were metal.

Q. Secondly, Captain, one of the reasons that the longshoremen couldn't or didn't like them was because they couldn't use them for shoring?

Mr. Morrison: Just a moment. That is so very leading that I have to object.

(Testimony of W. H. Cuthbert.)

The Court: You are a fairly good leader yourself. Ask the question.

Q. (By Mr. Roberts): They couldn't hammer nails into them for shoring, could they?

A. No, you can't. The metal ones, they can't hammer any nails in them for shoring.

Q. They can't utilize them in the hold for shoring or things of that nature? [223]

A. For shoring up and things like that, no.

Q. These ships were constructed during the war. Do you know why they had the metal hatch covers?

A. Well, yes. It is the fire hazard.

Q. And they wanted to keep less weight off the vessel?

A. Yes.

Q. And cut down the fire hazard?

A. Yes.

Mr. Roberts: That is all, Captain.

(Witness excused.)

Mr. Roberts: Your Honor, I will call Mr. Berg now. [224]

CLEMENT BERG

was produced as a witness in behalf of the Defendants and Third Party Plaintiff's and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberts:

Q. Will you state your full name, please?

A. Clement Berg.

Q. How old are you, Mr. Berg?

A. 56.

(Testimony of Clement Berg.)

Q. Where do you live?

A. 1023 Northeast 60th Avenue.

Q. How long have you lived in Portland?

A. Oh, about 30 years, or 35.

Q. What is your present occupation, sir?

A. I am stevedore foreman for Jones & Company right now.

Q. W. J. Jones & Company? A. Right.

Q. What is your official title on the water front?

A. Well, foreman or walking boss.

Q. Is a walking boss a member of the longshore union, or does he work for the stevedoring company?

A. For the stevedoring company.

Q. What does a walking boss do?

A. Well, supervises the work more or less.

Q. Do you supervise it from the dock or on the ship? [225] A. The ship and dock sometimes.

Q. Do you mix with the men? A. Yes.

Q. Are you down in the holds with them?

A. Yes, sir.

Q. Whom do you give your orders to?

A. Usually the gang boss. We have a gang boss for each hatch ordinarily.

Q. Do you have a gang steward, Mr. Berg?

A. Some companies. Not all of them.

Q. How many men usually comprise a gang?

A. Oh, that depends. Loading, 13 or 14, and discharging, 11 or 12.

Q. On the 9th of February, 1955, by whom were you employed?

A. By Portland Stevedoring Company.

(Testimony of Clement Berg.)

Q. On that day were you working on the vessel?

A. I was, yes.

Q. What vessel? A. Ventura.

Q. What kind of a vessel is that?

A. A C-2 as far as I am concerned.

Q. Do you know who the owner and operator is?

A. Matson and Oceanic.

Q. Where was the vessel berthed?

A. Terminal 4, Pier 2. [226]

Q. Do you remember what time you started work on that day, Mr. Berg?

A. Well, I am not quite positive about it. It was around 8:00 o'clock, anyhow.

Q. 8 o'clock in the morning? A. Yes.

Q. Do you know Mr. Swanson over here who is the plaintiff in this case? A. Yes, sir, I do.

Q. Was he on that crew working that day?

A. Yes, sir.

Q. Now, Mr. Berg, can you tell us your first indication of any trouble or any controversy that was going on in Hold No. 3?

A. Yes, I can. It was called to my attention after we got our uncovering done in the lower 'tween-deck, where we were supposed to work. We were supposed to work in the lower 'tween-deck.

Q. Before you go any further, you uncovered from the main deck down? A. Right.

Q. So you uncovered two decks; is that right?

A. That is correct.

Q. What kind of covers do you have on the main deck? A. The main deck, pontoons. [227]

(Testimony of Clement Berg.)

Q. What is a pontoon?

A. Well, it is about 5 feet wide, possibly $4\frac{1}{2}$ or 5 feet wide, and the width of the hatch, which is 20 feet ordinarily, or 21 maybe.

Q. What were these made of? Steel?

A. Steel.

Q. Then the next level below?

A. The next level below I am not so sure if we had wooden hatches or steel hatches.

Q. Let's get down to the lower 'tween-deck. How was that covered?

A. That was covered with steel hatches.

Q. Steel hatches supported upon what?

A. Supported by beams or strongbacks.

Q. What kind of strongbacks were they, do you know?

A. That is kind of hard to describe. Ordinary strongbacks, the usual strongbacks that we use, or beams, whatever you call them.

Q. Did they have a hatch dividing bar in between them?

A. Oh, yes. Short hatches all have them.

Q. Mr. Berg, you were not here yesterday when the gang testified, were you? A. No.

Q. Were you at No. 3 at the time all the covers were being taken off; that is, from the main deck down? [228]

A. Well, no, I couldn't say I was. We had five gangs. I go from one hatch to the other.

Q. Can you tell us when you first went to Hatch No. 3?

(Testimony of Clement Berg.)

A. I first went down there with Lundstrom, who was the gang boss. He came to me and says it was unsafe to walk on the hatch covers down in the lower 'tween-deck and we had to do something about it or they were not going to turn to.

Q. What do you mean, they were not going to turn to?

A. They were not going to go to work.

Q. Did he come out of the hold and tell you that?

A. Yes, I am pretty sure I went down in the hold—I am pretty sure he came up on deck and told me about it.

Q. What did he say again?

A. That they were unsafe to walk on; they were too dished and too warped and they were wobbling all over.

Q. That was the hatch covers? A. Right.

Q. Then what did you do with Mr. Lundstrom after he came up on deck?

A. I went down in the hold and I took a look at the situation, which was very bad, I admit.

Q. Who was there when you took a look?

A. Well, the whole gang was there.

Q. Was Mr. Lundstrom there? [229]

A. Yes, he was down there.

Q. Will you tell the Court what you found or what you saw?

A. We found the after beam, which was No. 7, was out of the socket, oh, between 3 and 4 inches, I would say, which made it very bad. And we were

(Testimony of Clement Berg.)

going to work in the 'tween-decks there, and we couldn't work on a surface like that at all.

Q. Were you going to utilize the surface of the hatch opening? A. Yes, sir.

Q. What were you going to load into the 'tween-deck? A. Lumber.

Q. How were the individual hatch covers on that particular opening?

A. Well, naturally they were all a little——

Q. How were they at the place where the beam was up? I mean the other hatch covers.

A. Well, the other hatch covers were okeh, but there were a lot of them—you couldn't walk on them the way you would want to. They were in very bad shape, the majority of them. I wouldn't say they were all bad, but the majority of them.

Q. What did they do—teeter-totter?

A. Yes, they did.

Mr. Roberts: Mr. Bailiff, would you get [230] those photographs.

Q. Mr. Berg, I understand some of these were taken after the accident? A. Yes.

Q. I am handing you at this time Pretrial Exhibit 41-C. Does that fairly represent the steel hatch covers? A. Yes.

Q. How about 41-A?

A. That is about what they looked like.

Q. And 41-B? I think that is the one standing up on its side.

A. It must be. Yes, that is the bottom side of it. I guess.

(Testimony of Clement Berg.)

Q. They are fairly representative, though, are they? A. Yes, that is it.

Q. So, as I understand your testimony so far, the men were not going to work; is that right?

A. Yes.

Q. What happened then?

A. Well, I spoke to——

Q. Down in the hold what did you do?

A. Well, I told them we will do one or the other; you can suit yourself. And I walked out of the hold. I told them, "Suit yourself. If you want to change the beam, okeh. Or we will get some lumber and floor it off solid," floor it off solid with lumber on top of the hatch so it would be [231] safe to walk on.

Q. You left it in the alternative?

A. Yes. I told them to suit yourself, so they decided they were going to change——

Q. I want to know exactly what you told Mr. Lundstrom and the crew?

A. We looked the beams over, and we found—to my recollection, the No. 1 beam was in the No. 7 slot. It was marked. There was a pencil or paint mark on the beam. And we went down below to look, and we took some hatches off, and we also went down below and saw that the beams were marked and that they were in the wrong spot. You see, we could tell from the top where it goes into the slot. That No. 1 beam was quite a bit shorter than the No. 7 beam, because it fitted right down in. There was,

(Testimony of Clement Berg.)

oh, probably an eighth of an inch still to spare. So we changed it and put it in aft.

Q. Did they change the two crossbeams when you were there?

A. No. I went up to get the lumber. We were still going to have lumber on after that, after we changed the beams, because the hatches wasn't safe to walk on anyway.

Q. You didn't know whether they were going to change the beams, did you?

A. We talked about it. When I got down there, I told them, "Suit yourself. I will go up and see what kind of lumber I [232] can get to cover the hatches."

Q. You said as far as changing the beams they could suit themselves; is that right? A. Yes.

Q. Do you know, in fact, whether the beams were ever changed or not?

A. They were changed.

Q. How do you know?

A. Because when I came back a short while after, they was still covering up. That is, they had the forward end all covered, already covered, and they were changing hatches in the after end.

Q. Could you tell whether the after beam was higher or lower then when you got back?

A. It was down in the socket.

Q. It was down in the socket. How do you know it was changed, though?

A. Well, because they told me they changed it. I wasn't there when they changed it.

(Testimony of Clement Berg.)

Q. They told you that? A. Yes.

Q. You left the hold; is that right?

A. Yes.

Q. And you climbed up on the main deck?

A. Yes. [233]

Q. To go and get some lumber? A. Right.

Q. Then what happened?

A. Well, in the meantime I understand—no, I came by the hatch after they changed it. First, when I went up to No. 2 or No. 1—I have forgotten which—I had to come back, and as I came back I noticed them covering the forward end. So I knew then they had changed the beam. And I went back. But in the meantime, anyway, I got hold of the supercargo to get the lumber down there to cover the hatch with, and we decided to get some rough 2 by 8's or 2 by 12's, whatever it was, some rough lumber.

Q. He told you where to get it; is that it?

A. Right.

Q. Then did you bring it back to the hatch, the lumber?

A. Well, the lumber was brought after the accident happened first.

Q. You didn't actually see the accident?

A. No.

Q. Mr. Berg, could you have just covered the faulty hatch covers with the lumber without changing the beams?

A. Well, it could have been done, yes, but it wouldn't have been too good to work on.

(Testimony of Clement Berg.)

Q. You would have to build it up on the end; is that right?

A. That is right, across the after end. [234]

Q. You could have done it that way?

A. It could have been done, but it wouldn't have been very——

Q. Did you call the ship's officers——

Mr. Wood: He didn't finish. He said it wouldn't be very——

A. I said it wouldn't be very practical. It would be very unpractical to work on a surface like that.

Q. (By Mr. Roberts): Mr. Berg, did you call the ship's officers or anybody regarding the condition of the hatch covers?

A. I am pretty sure I did. I talked to one of the Mates, whether it was the First, Second or Third. He was standing up over the hatch, I am pretty sure. Well, there was quite a delay there. Everybody was standing around doing nothing, so naturally I usually go to the supercargo first.

Q. Was it your intention to get the men working as soon as possible? A. Right.

Q. And you thought the quickest way to do it was to cover the opening; is that correct?

A. Correct.

Q. You didn't actually see the accident?

A. No, sir; I didn't.

Mr. Roberts: I think that is all. [235]

(Testimony of Clement Berg.)

Cross-Examination

By Mr. Morrison:

Q. So it was your plan, then, after they changed the beam to put lumber over these hatch covers to make them safe? A. Correct.

Q. And these hatch covers were badly bent and dished, weren't they?

A. Yes, they were very bad.

Q. In other words, they came up, a lot of them, like a saucer, and if you stepped on one end it would slip right out from under you? A. Yes.

Q. Approximately what percentage of those hatch covers were in that damaged condition?

A. Oh, I would say approximately half of them was in bad condition myself.

Q. Half of them you would say were in bad condition? A. Yes.

Q. Then your idea was to put lumber over them and then they could walk over the lumber in doing the work? A. Correct.

Mr. Morrison: That is all.

By Mr. Wood:

Q. I want to ask you a few questions, Mr. Berg. When the [236] men refused to work there, wouldn't turn to, because of the dangerous condition of the hatch, was it on account of the bad condition of the hatchboards or the raised beam that they were afraid of? A. It was both.

Q. Both of them? A. Yes.

Q. When you found that they didn't want to

(Testimony of Clement Berg.)

work under those conditions, you had a talk with the gang boss, Mr. Lundstrom, did you?

A. Yes, sir.

Q. And you told him to floor up, cover the hatch up with lumber? A. Right.

Q. You would go and get the lumber?

A. Yes.

Q. And you left it up to him to decide whether to change the beams or not? A. Correct.

Q. Now, they could have floored up with lumber without changing the beams, as I understand it, but you thought it was better to change the beams first?

A. Right.

Q. Is that correct? A. Correct. [237]

Q. When this difficulty arose at the hatch you talked to one of the men about it, didn't you?

A. I know I did, but which one I couldn't say.

Q. No. Did you discuss with him the bad condition of the hatches? A. Yes, I did.

Q. What did he say? Did he say they had complaints about them before? A. Right, yes.

Q. And did you discuss with him about the beams?

A. No. The beam wasn't discussed, I don't believe.

Q. It was more the condition of the hatches?

A. Right.

Q. Did he say that they had a lot of complaints about those hatches?

A. Yes. They have them all up and down the Coast, is the word he told me at that time.

(Testimony of Clement Berg.)

Q. Then when you did floor off the hatch after the accident with lumber, then it was safe to work on? A. Right.

Q. But before that it was not safe to work on?

A. No.

Mr. Wood: That is all. [238]

Redirect Examination

By Mr. Roberts:

Q. One question, Mr. Berg. If this condition was unsafe, as you have testified, wasn't it your obligation to stop the work? A. It was stopped.

Q. To allow the ship's personnel and officers to remedy the situation?

A. That is what we were working on, to make it safe to floor off and get her safe to work.

Q. And you did that yourself and not the ship's officers?

A. No, not the ship's officers. Between the super-cargo and I it was fixed up that way.

Q. It was done at your instigation, wasn't it?

A. Yes, sir. And the gang boss, he agreed if the floor was covered with lumber the men would go to work. We held kind of a little caucus down there. That is the only way they would agree to work.

Q. You were interested in getting them to work, weren't you?

A. In getting the men started and getting to work; right.

Mr. Roberts: That is all. Thank you.

(Witness excused.) [239]

EARL A. OLSEN

was produced as a witness in behalf of the Defendants and Third Party Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberts:

Mr. Roberts: Your Honor, I would like through this witness to put in Exhibits 45-A and 45-B, and also 46-A and 46-B. They are the contracts with the stevedoring company.

Mr. Wood: They are already in evidence, aren't they?

The Court: Yes, they are received.

Q. (By Mr. Roberts): Would you state your full name, please. A. Earl A. Olsen.

Q. Mr. Olsen, how old are you, sir?

A. 68.

Q. Where do you live?

A. At the present time Sutter Creek, California.

Q. Are you working?

A. No, I am retired.

Q. What were you doing on the 9th of February, 1955?

A. I was supercargo for Matson Navigation Company on the Steamer Ventura.

Q. When had you first gone on that vessel on that trip? [240]

A. I met the vessel at Yaquina Bay.

Q. What does the supercargo do, sir?

A. Supervises the loading of cargo and decides

(Testimony of Earl A. Olsen.)

the number of gangs to work and instructs the walking boss where to place the gangs and what cargo to load in which space in the ship.

Q. Did you join the vessel at Yaquina Bay; is that correct? A. That is correct.

Q. Who was the stevedoring contractor down there?

A. Independent Stevedoring Company.

Q. Was No. 3 hold worked? A. Yes.

Q. Did you see any uncovering in that hold?

A. Oh, yes. The ship arrived there from sea and all hatches were covered.

Q. All hatches were covered, including the lower 'tween deck?

A. And the only cargo worked at Yaquina Bay in No. 3 was in the lower hold, so they had to uncover all hatches.

Q. They had to uncover the lower 'tween deck?

A. Yes.

Q. In order to put cargo in the lower hold?

A. That is right.

Q. Who did the uncovering of the lower 'tween deck?

A. The longshoremen, the longshore gang. [241]

Q. Independent Stevedoring?

A. That is right.

Q. When the vessel had completed its loading at Yaquina Bay you covered up?

A. That is right.

Q. Who covered up?

(Testimony of Earl A. Olsen.)

A. The same gang, Independent Stevedoring Company.

Q. So they replaced the beams and hatch covers in No. 3 'tween deck; is that right?

A. That is right.

Q. You know that of your own personal knowledge, Mr. Olsen?

A. Oh, yes.

Q. Where did the vessel go after that?

A. She sailed from there to Portland, Terminal No. 4, Pier 2.

Q. Do you know about this accident to Mr. Swanson on the 9th of February, 1955, on the Ventura?

A. Yes. I didn't see it.

Q. You know about it. Now what time did the vessel, to the best of your recollection, arrive on the night of the accident?

A. Oh, I was down on the dock on or before 7:00 a.m. that morning.

Q. Did you see them uncover No. 3?

A. Well, not—partly, but not completely. I was all over the ship on the vessel at the time, yes. [242]

Q. What?

A. I was on the vessel at the time.

Q. Were you at one place or all over?

A. No, I was all over the ship.

Q. What was your first knowledge and when was that knowledge of any trouble in No. 3?

A. Well, I knew it before the accident. I was informed by Mr. Berg, the walking boss.

Q. Where were you at the time?

A. I don't recall whether I was up forward or

(Testimony of Earl A. Olsen.)

whether I came from aft, but I was on deck, and I came to No. 3 and he informed me that there was complaints about the condition of the hatch covers.

Q. Did you look down into No. 3?

A. I looked down from the deck, yes.

Q. Did you see the lower 'tween deck covering?

A. Yes.

Q. Did you see any beam that was 4 inches out of its slot?

A. Well, it is not too noticeable on deck looking down. It wouldn't look too bad from on deck.

Q. Did you notice the condition of the hatchboards at that time?

A. Yes, some of them were dished.

Q. Some of them were dished?

A. Oh, yes. [243]

Q. Did you see Mr. Berg down there?

A. Yes, he was down in the hatch. Then he came up on deck when I came alongside.

Q. I see.

A. And that is when we talked about getting some lumber to cover the hatches.

Q. Did you tell him where to get the lumber?

A. I told him where he could get the lumber, yes.

Q. Did you know anything about switching the beams?

A. Well, I didn't know at that time whether they were going to or not, but it so happened that they did afterwards, I understand.

Q. At the time you talked to Mr. Berg you

(Testimony of Earl A. Olsen.)

didn't know? A. No, not for certain.

Q. What happened thereafter, Mr. Olsen?

A. Well, when Mr. Berg went ashore to arrange for the lumber I went aft then to get the No. 4 and 5 gangs started on the cargo. I was aft when the accident happened.

Q. What?

A. I was in the after part of the ship when the accident happened.

Q. What time had elapsed from the time you left No. 3 until the accident happened?

A. Oh, it may have been 15 or 20 minutes, something like that, maybe a little longer. [244]

Q. Did you go back to No. 3? A. Oh, yes.

Q. What did you see or find?

A. Well, you mean after the accident happened?

Q. Yes.

A. Well, the hatch was covered except the after section, I believe. Just some boards in the after section.

Q. Where was Mr. Swanson?

A. He was down below.

Q. What?

A. He was down in the lower hold.

Q. You could see him down in the lower hold?

A. Well, I couldn't see him from the deck, but I know he was.

Q. Did you see any hatch covers in the lower hold? A. No.

Q. You didn't see any?

(Testimony of Earl A. Olsen.)

A. There may have been one there, but I didn't see it.

Q. Mr. Olsen, how long have you been on the water front? A. Since November, 1921.

Q. Have you worked on these vessels with steel hatch covers before? A. Oh, yes.

Q. Based on your observation of the steel covers that you saw on the No. 3 'tween deck, do you think if you stepped [245] on one end it would dish up over the flange?

A. No, my observation is that they were not dished endways. They were just dished sideways mostly.

Q. Sideways?

A. They may have had a tendency to slide sideways, but not endways over the strongback.

Mr. Roberts: I think that is all, sir.

Cross-Examination

By Mr. Morrison:

Q. Did I understand you to say they were just dished on the side?

A. Well, more so than endways, is what I have in my recollection.

Q. Now take a look at these two pictures of the ones that were down in the hold. Aren't those dished in the middle?

A. They are dished both ways there.

Q. They are dished both ways, aren't they, those two that you found in the hold? A. Yes.

(Testimony of Earl A. Olsen.)

Q. Referring now to the defendants' exhibit, doesn't that show it is dished on the end?

A. Well, that is a wooden hatchboard there.

Q. That is wooden. But the two that I have shown you which are plaintiff's exhibits show them dished both ways, [246] on the side and front; is that correct?

A. That is right.

Mr. Morrison: Thank you.

Redirect Examination

By Mr. Roberts:

Q. Mr. Olsen, the length of the hatchboards there at the middle is the same, isn't it?

A. Well, it wouldn't shorten them very much in that amount of dish, no. The corners were where most of the dish is.

Mr. Roberts: Thank you. That is all.

(Witness excused.)

Mr. Roberts: That is all of our case on liability. We have the delay for the medical, your Honor, at your convenience.

The Court: What is your plan?

Mr. Morrison: I think the doctors are due back the 11th, if the Court please.

The Court: What day is that?

Mr. Morrison: That would be Monday.

The Court: We better set a time then.

(Discussion off the record.)

(Whereupon, an adjournment was taken until Tuesday, February 12, 1957, at 12:00 [247] noon.)

Portland, Oregon, February 12, 1957

(Court reconvened, pursuant to adjournment, at 12:00 noon, and proceedings herein were resumed as follows:)

Mr. Morrison: If the Court please, Mr. Wood is not here. He indicated the other day he was not calling any medical testimony. I don't know whether he planned to be here or not.

The Court: We will go ahead.

HOWARD L. CHERRY

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Morrison:

Mr. Morrison: If the Court please, before going into the examination of this witness, there is a stipulation that we wanted to put in the record, and that is that under the union rules of this long-shoremen's union the voluntary retirement is at the age of 65 and compulsory retirement at the age of 68, and that if they stay until 65 there is \$100 a month pension. [248]

Mr. Roberts: I will so stipulate.

The Court: As I understand, he is 53 now?

(Testimony of Howard L. Cherry.)

Mr. Morrison: 55 now. He was 53 at the time of the accident.

The Court: The point of your stipulation is that he is defeated of his pension rights?

Mr. Morrison: That is one, and the fact that he could stay on until he was 68.

Mr. Roberts: Your Honor, I don't know that I can stipulate on that phase, that it defeats his pension rights.

Mr. Morrison: Yes, it does. He has to stay until he is 65. You might check on that. Let's reserve that, and the counsel can check on it.

The Court: Withdraw the stipulation.

Mr. Roberts: Yes, your Honor.

Q. (By Mr. Morrison): State your name, please. A. Howard L. Cherry.

Q. Are you a regularly licensed physician and surgeon, Doctor? A. Yes.

Q. Of what schools are you a graduate?

A. Oregon State College, 1938; University of Oregon Medical School in 1943.

Q. Do you specialize?

A. Yes, in orthopedic surgery. [249]

Q. What training did you take to specialize in that?

A. An internship at the University of Iowa Hospital; two years in the Army, half of which was orthopedics; three years of residency at the Veterans Hospital in Portland, and the Shrine Hospital in Spokane.

Q. You are with Blair & Thatcher?

(Testimony of Howard L. Cherry.)

A. Blair, Thatcher & Davis.

Q. How long have you been with them?

A. Since 1949.

Q. What hospitals are you identified with?

A. St. Vincent's Hospital, Providence Hospital and the University of Oregon Medical School Hospitals.

Q. What medical societies are you a member of?

A. I belong to the County and State Medical Societies and to the American Academy of Orthopedic Surgery, the Western Academy of Orthopedic Surgery and the Northwest Orthopedic Society.

Q. Doctor, when did you first see Mr. Swanson?

A. Mr. Swanson was sent to our care at St. Vincent's Hospital following an injury, and at that time it was mainly a skull injury and we immediately turned him over to Dr. Kloos, who is a neurosurgeon.

Q. Your office does work for the longshoremen, do you not? A. Yes, that is right.

Q. And in case of an injury they are referred to you and you [250] either treat them or send them to some other specialist in a particular field?

A. That is correct.

Q. And in this case you referred him to Dr. Kloos; is that correct? A. That is right.

Q. Then how frequently did you see him after that, Doctor?

A. I turned him over completely to Dr. Kloos and I didn't see him again until May 27th, 1955.

Q. What were his complaints then?

(Testimony of Howard L. Cherry.)

A. Dr. Kloos had treated him and operated on him, as you know, and he came to our office at that time from Dr. Kloos complaining of pain in his back and legs. He complained that there wasn't much life in his legs, which is a quote, but besides the pain he complained that he couldn't handle his legs well. We examined him and he was sore in particular at the lumbosacral area. He had some X-ray changes in the form of congenital changes in his low back and some osteoarthritis. He had considerable spasm and tenderness in his low back. At that time I treated him by furnishing him with a canvas belt with a pad and had him get some physical therapy.

Q. You sent him for physical therapy?

A. Yes.

Q. Then when did you next see him, [251] Doctor?

A. I next saw him on June 10th of 1955, approximately two weeks later.

Q. What were his complaints then?

A. They were much the same. He was then wearing the belt which he thought helped him, and he was getting the physical therapy, and I suggested he get two more weeks of physical therapy.

Q. That was before he was operated on the second time, was it not, Doctor?

A. I don't know when he was operated the second time.

Q. I believe December, 1955?

(Testimony of Howard L. Cherry.)

A. It would be before that. This was June 10th, 1955.

Q. When did you last see him?

A. The only other time that I saw him was February 11th, 1957—yesterday.

Q. You saw him yesterday? A. Yes.

Q. Did you examine him yesterday, Doctor?

A. I examined him in regard to his back, yes.

Q. You limited your examination to the back and not to any head injury?

A. That is right.

Q. Now what were his complaints yesterday on the back, Doctor?

A. He complained that his back hurt him all the time, and [252] it was essentially his entire back, the dorsal spine and the lumbosacral area. He complained he was cold at the time, and it was quite warm in our office. He came wrapped up, but he was still cold. He complained of loss of strength, a general loss of strength, and inco-ordination. He walked rather deliberately and slowly, and talked—I would describe it more childishly.

Q. I didn't hear that?

A. He talked rather childishly. His responses were rather simple. On examination he was extremely tender over his entire spine from the base of his neck to and including his coccyx. On very slight pressure he would almost fall over from apparent pain. His straight-leg-raising tests was about 60 degrees bilateral, normal being close to 90 degrees. His knee jerks, knee kick and ankle jerks,

(Testimony of Howard L. Cherry.)

were active and equal. From normal activity the sensation in his legs was not particularly changed. He was extremely tender around the area of the coccyx, and complained of episodes of marked spasm in the very lowest part of his back. And he had one of these spasms while he was in the office, which appeared to cause him considerable discomfort at the time.

Q. Where did this spasm affect him that he had while he was in your office?

A. It was in the region of the coccyx. [253]

Q. Was that in your opinion real?

A. Yes, I think it was.

Q. It was not feigned? A. No.

Q. That was yesterday? A. Yes.

Q. You may continue, Doctor.

A. I am through.

Q. Doctor, what was your conclusion from your examination yesterday as to his back condition?

A. My conclusion is that he undoubtedly has trouble with his back, but that he tremendously overacts to it because of central nervous system disturbance.

Q. Central nervous system disturbance?

A. Yes.

Q. You feel that that is real, do you not, Doctor?

A. Yes.

Q. What is your opinion regarding the permanency of that, or would you have to base that some on the findings of the neurosurgeon?

(Testimony of Howard L. Cherry.)

A. I think that a neurosurgeon could give you that better than I could.

Mr. Morrison: You may examine. [254]

Cross-Examination

By Mr. Roberts:

Q. Dr. Cherry, had there been any substantial changes or differences between your examination of Mr. Swanson the first time you saw him and the present time? A. Yes.

Q. What would they be, Doctor?

A. He was much more sore and much more reactive at the present time, and he impressed me, just talking to him, as not being as good mentally as he was on the first occasion.

Q. From an orthopedic viewpoint, though, isn't it true, Doctor, that you don't feel that he has sustained any great orthopedic injury?

A. It is my opinion that he has had a low back strain.

Q. A low back strain?

A. Yes, but that he does react more severely to it than the ordinary person with the same amount of injury would react.

Q. There were no broken bones, were there, Doctor? A. No, no broken bones.

Q. Any evidence of any disk trouble?

A. No, I couldn't make a diagnosis of disk trouble.

Q. You think that he overreacts to the back complaint; is that correct, Doctor?

(Testimony of Howard L. Cherry.)

A. I think that he has a greater reaction to it than an [255] ordinary person would for the amount of injury he had to his back.

Q. Doctor, did you take any tests, Hoffman tests, or anything like that?

A. No. Those are neurological tests. They are not related to back injury, and I am not as competent to interpret them as other examiners that he had.

Q. The Babinski test, or anything like that?

A. I didn't do a Babinski test.

Q. What objective findings did you have, Doctor, as a result of your examination of yesterday?

A. I had the reaction to the pressure that I placed on him, and I had the observation of spasm in his back when he goes into this severe spasm. I have the X-ray examination that shows osteoarthritis and a congenital deformity. That is essentially it.

Q. Was the spasm a temporary thing, the muscle spasm?

A. Yes.

Q. Do you usually find that as an objective finding when a person has an orthopedic injury of some sort?

A. You may. I would say more commonly you would have less spasm and have it more permanent, but you can have it that way.

Q. Doctor, in the course of your treatment I believe you testified that you only saw him twice, May 27th of 1955, and [256] June 10th of 1955, and then

(Testimony of Howard L. Cherry.)

yesterday. You have only prescribed physical therapy and also the back belt; is that right?

A. Did you say that I only prescribed those?

Q. Yes.

A. Yes. He came to my office on one other occasion, June 24th, 1955, but didn't wait to be seen. Sometimes there is such a thing as having a fairly long wait in our office, and that may be the instance. But he didn't come back to us after that because of his back.

Q. Did Mr. Swanson at any time request further treatment, therapy treatment?

A. I don't recall that he did.

Q. Do you know where he was getting the therapy treatment? A. I don't remember.

Q. I think he testified it was the Providence Hospital, Doctor? A. It may well have been.

Q. Pardon? A. It may well have been.

Mr. Roberts: I think that is all, Doctor.

Redirect Examination

By Mr. Morrison:

Q. One other thing, Doctor: There is some medical testimony [257] by Dr. Kloos that after the second operation he became belligerent and took on a lot of delusions of persecution and things. Now is that consistent with your finding yesterday that he appeared different to you yesterday, mentally, than he was when you were examining him in 1955?

A. I believe it is.

Mr. Morrison: That is all.

Mr. Roberts: No further questions.

(Witness excused.)

Mr. Roberts: Your Honor, I have just two medical witnesses. I asked the first to come at 12:30 and Dr. Marxer right after that.

The Court: Who is your first one?

Mr. Roberts: Dr. Edward Davis.

(Short recess.) [258]

EDWARD W. DAVIS

was produced as a witness in behalf of the Defendants and Third Party Plaintiffs, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberts:

Q. Would you state your full name, Doctor, so the Court can hear you?

A. Edward W. Davis.

Q. What is your profession, sir?

A. Physician and surgeon.

Q. Doctor, where were you graduated?

A. University of California.

Q. What post-graduate work did you do?

A. I graduated in 1938 and took post-graduate work at the University of California Hospital until 1941, and then went to the University of Illinois, in Chicago, where I took two more years, and then went into the service.

Q. What service did you go into?

(Testimony of Edward W. Davis.)

A. In the Navy. Following that in 1946 I returned to the University of California on the staff, and remained on the staff in the Department of Neurological Surgery until 1948, when I came up here.

Q. What societies do you belong to, Doctor?

A. In my specialty or just general [259] medical?

Q. The general medical and then the specialty.

A. The American Medical, Multnomah County and the Oregon State Medical Societies, and then in the specialty of neurosurgery I am in the Harvey Cushing Society, the Academy of Neurological Surgery, the Western Neurological Society, the Oregon Neuropsychiatric and the San Francisco Neurological. I think that is all.

Q. Are you on the staff of any of the hospitals, Doctor? A. Yes, sir.

Q. Which hospitals?

A. Providence, St. Vincent's, Holladay Park, Portland Sanitarium, Physicians and Surgeons and consultant in neurosurgery at the Veterans' Hospital in Portland and in Vancouver, Washington.

Q. Doctor, are you on the staff of the Medical School up on the hill? A. Yes, sir.

Q. In what department?

A. Department of Surgery.

Q. Are you an instructor up there?

A. Yes, sir.

Q. Of surgery or neurosurgery?

(Testimony of Edward W. Davis.)

A. It is in the Department of Surgery, but actually it is the neurosurgery division of it.

Q. The Division of Neurosurgery? [260]

A. Division of Neurosurgery.

Q. Do you practice with anyone, Doctor?

A. Yes, sir; with Dr. Kenneth Livingstone.

Q. Dr. Kenneth Livingstone? A. Yes, sir.

Q. As I understand it, you have been in practice in Portland since 1946; is that right?

A. 1948, sir.

Q. Do you confine your practice and do you specialize in any particular field of medicine?

A. Yes, sir. Our practice is confined to neurological surgery.

Q. Now, Dr. Davis, did you see Mr. Swanson at my request and, if so, when?

A. I did. I have seen him on two occasions. The first was on September 7th, 1955, and the second was on January 7th, 1957.

Q. Doctor, you may use your notes to refresh your recollection. In regard to the first visit did you make an examination of him and, if so, what were your findings?

A. I did. He was seen in my office on September 7th, 1955. He gave me a history that he had been injured on February 9th, 1955, when he fell through a hatch. He didn't remember exactly what had happened. He was treated at St. Vincent's Hospital by Dr. Kloos and was discharged on March 20th, 1955. [261] At the time of his discharge he stated that he was able to get about enough to go to the

(Testimony of Edward W. Davis.)

bathroom, but he still didn't remember very much of what happened during this hospitalization. Following this hospitalization he apparently was readmitted to the hospital and—no, excuse me. I am mistaken there. Apparently shortly after his admission to the hospital burr holes were put in on the suspicion that he might have a subdural hematoma, or collection of blood——

Q. Excuse me, Doctor, when you saw him September 7th, 1955, what complaints did he have at that time?

A. He stated that he still had a band-like sensation around his head, but this was not bothering him particularly. He stated that he had some headaches immediately following the accident and when he was first at home, but those had subsided, and he had no complaints other than this concerning his head. He felt that his memory had returned to normal, and he complained of no dizziness. He had had no visual disturbances. He also stated that after he was home and up and about he had a good deal of pain across his low back. He was fitted with a brace which rubbed his skin off so that it was uncomfortable and he was unable to wear the brace. He complained of some pain extending from the back down into both legs and of a generalized loss of strength not only in the legs but also in the arms.

Q. Doctor, what were the results of your neurological [262] examination of Mr. Swanson at that time?

A. Except for the burr hole effects, which were

(Testimony of Edward W. Davis.)

palpable in the skull where the openings had been made, the neurological examination was negative. In other words, in testing the cranial nerves they were all normal. Sensation over his extremities and trunk was normal. In testing the motor power he seemed to show a generalized weakness. It was my impression at that time that this was perhaps an involuntary inhibition. I wasn't sure in testing his reactions because of his complaint of pain whether perhaps the pain may be causing him not to exert full strength, but at any rate there was no difference between the two sides and the reflexes were perfectly normal at that time. I found no other difficulties as far as the neurological examination was concerned.

Q. Doctor, you said you gave him neurological tests. What kind of tests are these? How do you test the cranial nerves, the reflexes, and so forth?

A. Well, the cranial nerves are tested depending upon what they subserve. For instance, the first cranial nerve is the sense of smell, so you test them with some object that you can smell. The second has to do with vision, and the third, fourth and sixth with the eye movements, so you test all of these individually. In testing sensation of the body, usually you use a pin. In testing strength you have to rely on the [263] patient. In other words, if you grip or hold his arm up and see how much strength it takes to pull it down, and the same with the legs.

Q. These tests were essentially negative from a neurological viewpoint; is that correct?

A. Yes, sir.

(Testimony of Edward W. Davis.)

Q. Now, Doctor, does your field to a certain extent overlap into orthopedics sometimes?

A. In some instances, yes.

Q. Based on your examination of Mr. Sawson in September of 1955 and his complaints to you, did you form any opinion as to what his main complaint was at that time?

A. Yes, sir; I did. His complaints primarily at that time were of his low back pain, with some radiation into his legs. I felt quite sure that he didn't have a herniated disk; that is, with nerve root compressions, but that he may have suffered some sprain of his low back, and I felt that it was primarily an orthopedic problem rather than a neurological problem.

Q. Did you see Mr. Swanson again, Doctor?

A. I did, yes.

Q. When was that?

A. That was on January 7th, 1957.

Q. Did you conduct another neurological examination? A. Yes, sir. [264]

Q. By the way, before we go into that, did he give you any history as to how he was feeling from the head viewpoint since the time of your first examination? A. At the second examination?

Q. Yes. A. Yes, sir; he did.

Q. What was that, Doctor?

A. This time he had other complaints which he had not had before. He stated that his vision was not as good as it was and that it appeared to be getting worse. He had complained of headaches, and

(Testimony of Edward W. Davis.)

he said that the reason he had not returned to work was that he was unable to get around well.

Q. Before you go any further, Doctor, did he elaborate on that in any way?

A. As far as not getting around?

Q. Yes.

A. Yes, he said that he couldn't get around because something seemed to hold him back, and he couldn't explain this. He said it wasn't pain. For instance, if he went to reach for an object he couldn't quite get it into his hand or grip it because something inside him seemed to hold him. The same with his legs. If he was going to get up out of a chair something seems to hold him down. I think again it was not akin to pain. It was just something that he couldn't explain. [265]

Q. Continue, Doctor.

A. During the examination the patient also volunteered information that his initial legal counsel was crooked, and that a barber at St. Vincent's Hospital—or, rather, he had the impression that a barber at St. Vincent's Hospital was angry with him because he had had his own barber come in and shave him, and he was a little fearful of this man.

Q. What did your examination reveal?

A. Essentially similar findings to that that I found in '55. There was still some tenderness over the back, but no muscle spasm. He was able to flex quite well, and straight leg-raising tests were not limited. The neurological examination was essentially the same except that his generalized weakness,

(Testimony of Edward W. Davis.)

at least to examination, was more marked. In other words, in testing his grip he would not grip with any strength at all. In testing his legs one could hold back, for instance, from either flexing the leg or extending it at the knee with just one finger. You could hold the leg back so that he didn't move it.

Q. Did you form any impression from these tests, Doctor?

A. Yes, I did. It was my impression that this was not organic. In other words, there was no nerve lesion, because if the strength in the man's legs were as little as he showed when under examination he would not be able to walk; he would not have enough to lock his knee, for instance. [266] However, he was able to walk and get about. It was my impression that perhaps this was a voluntary inhibition. In other words, he didn't put forth a maximum amount of effort. There was still nothing to indicate any nerve damage either in the brain or his spinal cord or in the peripheral nerves.

Q. How were the reflexes on the second examination, Doctor? A. They were quite normal.

Q. Was there any atrophy of the body in any way? A. No, sir.

Q. By the way, how do you usually get atrophy when a person is hurt? Is it the lack of use of the muscles?

A. There are two types: Lack of use of a muscle will cause some shrinking, or if the nerve is damaged, particularly the peripheral nerve, then the muscle fibers shrink down very rapidly.

(Testimony of Edward W. Davis.)

Q. You didn't find any atrophy of the muscles here? A. No, sir.

Q. You didn't treat Mr. Swanson in any way, did you, Dr. Davis? A. No, sir.

Q. Did you come to any conclusion as to whether he sustained any head injury?

A. Yes. Certainly from the history, this man did sustain [267] a head injury. He undoubtedly had a severe concussion and perhaps some contusion of his brain. However, it was my impression initially, after the first examination, that he had recovered remarkably well from this. I could find no definite residuals. Now he had more complaints, which again is somewhat unusual. If I may explain that a little, after a head injury the complaints that they have as far as perhaps memory loss or visual changes or headaches are usually most apparent right at first and in the ensuing few months. They ordinarily don't subside over a period of time and then some months or years later get worse. It ordinarily doesn't take that course. When I first saw him, he had very little complaint referable to his head injury. He had had some headaches, but he thought that otherwise things were pretty good, and it was all at that time his back. Yet when I saw him the next time a year or so later, he then was complaining of these other things; visual disturbance, headache, and so on.

Q. You say that is not usually the pattern that is followed in a head injury?

(Testimony of Edward W. Davis.)

A. No, sir. Ordinarily they will be worse at first and gradually improve.

Mr. Roberts: I think that is all. [268]

Cross-Examination

By Mr. Morrison:

Q. Doctor, the first time you examined him was in 1955, was it not?

A. That is correct; yes, sir.

Q. The next time you examined him was just a few weeks ago, was it not? A. Yes, sir.

Q. Now, when you examined him the last time did he tell you that he had to go back to the hospital in December of 1955, and they operated on his brain again? A. He didn't tell me that, but——

Q. He didn't tell you that?

A. No, sir; but I understand——

Q. When you saw him a couple of weeks ago, didn't you inquire then about what his condition was following through from the first time you examined him in '55?

A. Yes, I asked him what his symptomatology was.

Q. And he never told you that since the last time you had examined him he had been operated on again? A. No, sir; I don't believe so.

Q. When did you first see the hospital records?

A. Just a few minutes ago.

Q. Just a few minutes ago. In other words, you

(Testimony of Edward W. Davis.)

didn't have these hospital records available to you when you made [269] your examination?

A. No, that is correct. I had some information concerning them.

Q. Wouldn't you think it rather strange that he would not tell you when you examined him two or three weeks ago about this other ordeal he went through when he had these holes bored again in his head?

A. No, I wouldn't think so.

Q. You wouldn't think that was unusual?

A. I didn't ask him specifically about it. I was interested only in what his progress had been as far as his general physical status was concerned.

Q. And in this progress he never told you about this bad reaction he had, where he was taken again to the hospital and reoperated on?

A. I don't think there was any bad reaction, was there?

Q. I would think that there would be a bad reaction, when a neurosurgeon would call him in and rebore those holes. I wouldn't think he would do that unless there was a pretty bad reaction, would you?

A. Well, of course, as I say, I know what the circumstances were and I know why the holes were rebored.

Q. You didn't know it, though, at the time you talked to him two or three weeks ago, that they were rebored?

A. Yes, I think that I had that information. Let me just [270] look here.

(Testimony of Edward W. Davis.)

Mr. Roberts: Your Honor, when I asked him for the second examination, I think I advised the doctor as to that.

The Witness: That is correct.

Mr. Morrison: I am asking about that the patient never advised you of that?

A. No, and I didn't ask him the specific question.

Q. And you didn't ask him how he got along after that second operation?

A. I asked him how he got along in general since I had seen him.

Q. Now, Doctor, speaking now about the last time you examined him two or three weeks ago, how long did that examination take you, approximately?

A. Oh, I would say 45 minutes or an hour.

Q. Did you talk to him quite a little bit during that examination? A. Yes, sir.

Q. Did his conversation make sense to you?

A. No, I felt that the man had a psychiatric difficulty which I noted at that time. In fact, in my recommendation after the last examination, if I may read to you——

Q. No, I am not asking you about that, what you wrote to your company. I am asking you what your reaction was to [271] him.

A. Yes, I thought he was psychiatrically upset.

Q. You didn't think he was normal, did you, when he was in there a couple of weeks ago, normal mentally? A. From a mental standpoint, no.

(Testimony of Edward W. Davis.)

Q. From a mental standpoint it was your conclusion he was not normal a couple of weeks ago?

A. That is correct.

Q. And you had no information, did you, that prior to this initial accident or the second operation that he ever evidenced these abnormal tendencies or mental tendencies, did you?

A. Yes, I think that was one reason that he had the second operation, because he was showing abnormal mental reactions.

Q. I didn't make myself clear. Before the original accident you had no history that he showed these tendencies, did you? A. No, sir.

Q. You didn't know until you saw the records today that this man was unconscious for eight days following the original accident, did you?

A. Yes, sir. Yes, in his initial history he told me that he had been unconscious for a period of one week, approximately one week. That was the basis of my impression that [272] he did suffer a moderately severe head injury.

Q. But you didn't know until you saw the hospital records today, did you, that there was a marked swelling of the brain found on that first operation?

A. Yes, I had been informed of that previously in the information that I had prior to the time that I saw him.

Q. That was furnished, no doubt, by counsel?

A. Yes, sir. Of course, the swelling that he had would be quite consistent with the amount of head injury he sustained.

(Testimony of Edward W. Davis.)

Q. Now, when you examined him two weeks ago do your records that you have with you there show a negative Hoffman test? A. They do.

Q. You have that written down there, have you?

A. Not specifically, but I have that he had no neurological changes.

Q. Yes. You don't have written in your records there that he had a negative Hoffman test?

A. No. Ordinarily in doing a neurological examination I don't write down in my notes every negative finding of every test that I do. It would be practically impossible.

Q. Did you make a Babinski test on him two weeks ago? A. Yes, sir; and it was negative.

Q. Does your record show that that was negative or normal? [273]

A. He had no pathological reflexes. Both the Hoffman and the Babinski are pathological reflexes.

Q. I am not trying to make any comparisons between your testimony and some other doctor's, but Dr. Kloos testified the other day and stated that the day before he examined him and found a positive Babinski bilaterally and a positive Hoffman on the left side. Would it be unusual for that to happen? Could that come on in that interval between your examination and his?

A. It is not unusual for those reflexes to change. But was the positive Babinski found recently or at the time that he was in the hospital after the injury?

Q. Yes, he found a positive Babinski here on his

(Testimony of Edward W. Davis.)

examination last week bilaterally and a positive Hoffman on the left side.

Mr. Roberts: Your Honor, I don't know whether Mr. Morrison is misquoting the evidence, but I don't remember such testimony. I have an idea he said there was no positive Babinski and there was a very slight indication of a positive test on the left side.

Mr. Morrison: The records show that every time he examined him at all times he treated him he had a positive Babinski, and when he examined him the other day it was more marked and bilateral, on both sides. The Hoffman was on the left side. The record will show that. [274]

The Witness: Well, I didn't find either.

Q. Now, Doctor, the testimony in here is that these personality changes developed after the second operation; that following the second operation he became belligerent.

Mr. Roberts: Your Honor, I think again Mr. Morrison is misquoting the record. The hospital records are in here. They are admitted into evidence, and they show that the man was very belligerent at the time of the first admission to the hospital, and they show that he was belligerent at other times in the hospital.

Mr. Morrison: I am talking about these other tendencies. The records will show that they developed after the second operation.

Mr. Roberts: What tendencies?

Mr. Morrison: The tendencies about the barber and the persecution complex.

Mr. Roberts: The hospital records speak for

(Testimony of Edward W. Davis.)

themselves, your Honor, and I think it is all in there. It is exactly the same pattern and story from the beginning.

The Witness: Actually, unless I am mistaken, the second operation consisted of very little; merely opening the holes and looking, which is of essentially no significance. I mean that is very minor.

Q. (By Mr. Morrison): That is right, but following that, for instance, he thought a little barber over there was going [275] to cut his throat?

A. Yes, he told me about that.

Q. And the evidence is that he is suspicious of people. For instance, the evidence is he is suspicious of his union representatives that have been trying to help him. He is even suspicious of me. I am his second lawyer. I am not his first.

The Witness: No, I understood that he had had trouble with his first lawyer.

Q. Of course, that is not normal, is it, Doctor?

A. No, that is a very definite paranoid tendency.

The Court: You were up there, and you thought that little barber had a shaky hand, I remember.

Mr. Morrison: That is true, your Honor. But he was so small I wasn't afraid of him. He did appear a little shaky.

The Witness: I would certainly agree that he shows paranoid tendencies, a schizophrenic type of reaction. With a head injury a schizophrenic reaction is not usual. I would suspect that he had this trend prior to his injury. In other words, if we were

(Testimony of Edward W. Davis.)

able to get a good injury of him in the past, I think he would have shown a schizoid trend.

Q. Don't you think that it has given us an opportunity to get a pretty good history from people that have been [276] associated with him in the past?

A. I can't say, sir.

Q. They have not brought anything in here.

A. But in general a head injury produces memory disturbances and personality change, but not a schizoid type of reaction, what is termed a psychotic reaction. Ordinarily head injuries do not produce a psychosis.

Q. Didn't he tell you that he has trouble with his memory?

A. The first time that I saw him——

Q. No, no, I am talking about——

A. He said he had gotten all over it.

Q. The second time didn't he tell you he had had trouble with his memory?

A. Yes.

Q. Did he tell you that he has to write things down carries a book around with him and writes even any appointments or anything, he writes it down? Did you notice that?

A. Yes, and again, you see, that is what bothers me about this man. That is not according to what one would expect with a head injury. The memory is worse at first and then it gets better.

Q. Let's assume, Doctor, that there have been a number of people in here that associated with this man before this accident occurred, and that he was

(Testimony of Edward W. Davis.)

a jovial person at that time, that he was a hard worker and, as one person said, he [277] was a good neighbor, and he never had any gripes against any person. These people worked with him for years up until the time of the accident. Now, assuming that to be true, because there is no evidence in here to the contrary, wouldn't you think that this accident had something to do with this change?

A. You would have no other choice.

Mr. Morrison: No other choice. I think that is all, Doctor.

Redirect Examination

By Mr. Roberts:

Q. Just one more question, Doctor: Just summarizing your evidence, your examinations the first time and the second time from a neurological viewpoint, all the tests that you neurosurgeons give were essentially negative as far as Mr. Swanson was concerned; is that correct? A. Yes, sir.

Mr. Roberts: Thank you, Doctor.

(Witness excused.) [278]

JOHN L. MARXER

was produced as a witness in behalf of the Defendants and Third Party Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberts:

Q. Doctor, would you state your full name, please? A. John L. Marxer.

Q. Your occupation?

A. Orthopedic surgeon.

Q. Doctor, will you give us your background, your training and experience and where you graduated from?

A. I graduated from Creighton University in 1930. I interned first at St. Vincent's Hospital in Portland here until June of 1931, and then I went to Bellevue Hospital in New York City, and then followed with a residency at the Cumberland Street Hospital in Brooklyn, New York, which I finished in the first of the year 1933. I came back and practiced in general practice until 1940. Then I went to the University of Iowa, the Department of Orthopedic Surgery, where I remained for the next three and a half years. I started practicing orthopedic surgery as a specialty in 1944 in Portland, Oregon, and I have been practicing that specialty since that time.

Q. Are you associated in the practice of Medicine with [279] anyone, Doctor?

A. Yes, I am. There are three of us. There is Dr.

(Testimony of John L. Marxer.)

W. H. Clarke and Dr. John Harder, all orthopedic surgeons.

Q. Doctor, I understand you have a substantial practice through the Industrial Accident Commission in orthopedic work?

A. Yes. Most orthopedists do.

Q. Doctor, to what societies do you belong?

A. I am first a member of the Multnomah County Society, the Portland Academy of Medicine, the American College of Surgeons, the International College of Surgeons, the American Board of Orthopedic Surgery and the American Academy of Orthopedic Surgery.

Q. Those are two orthopedic honoraries?

A. That is right.

Q. Doctor, what hospitals are you a member of?

A. I am a member of St. Vincent's Hospital, Providence Hospital and Holladay Park.

Q. Do you have any connection with the University of Oregon Medical School? A. I do.

Q. What is your connection there?

A. I am teaching in the Crippled Children's Division.

Q. In what?

A. The Crippled Children's Division. [280]

Q. Is that at Doernbecher?

A. No, that is in the University proper. They have their own building there actually, but it is not in pediatrics. It primarily has to do with orthopedic problems.

Q. Orthopedic problems with crippled children?

(Testimony of John L. Marxer.)

A. With children, yes. "Children" actually goes up to 20 years old.

Q. Now, Doctor, did you at my request make medical examinations of Mr. Guy W. Swanson?

A. I did.

Q. When was the first examination that you made?

A. The first examination was made on May 9th, 1956.

Q. May 9th, 1956? A. That is right.

Q. What history did Mr. Swanson give you as to his particular complaints at that time?

A. He stated that on February 9th, 1955, he was working as a longshoreman, covering up a hatch, and states that he stepped into the hatch cover and from that time on he does not remember anything. The patient states that he has been informed that his head hit a beam and he went down into the lower part of the hatch. At any rate, he states he was unconscious, and actually does not remember anything for days. He was first treated by Dr. Ed Kloos, who apparently did surgical exploration on his head. He states as far as [281] his back is concerned that it bothered him in the hospital when he was there the first time, and because of this he was cared for by Dr. Howard Cherry. After the examination, however, no definite treatment was given for his back. The patient states that his back pain is present both night and day. He describes the pain as being of a steady ache in character. He states that he practices bending every day. He bends and

(Testimony of John L. Marxer.)

moves around very slowly and deliberately, however. He had pain from his hips down to his feet, and he states he has an abnormal sensation on the bottoms of his feet. Coughing or sneezing does not affect the condition. He sleeps fairly well. He states that he sleeps some in the daytime, and then again he will sleep some at night, but every time he wakes up he has pain in his back and sometimes has to lie on his stomach for relief. He doesn't notice any difference in the weather; either winter, summer, rain or shine.

His past history was essentially negative, and the history by systems was negative, except as far as the upper extremities were concerned he states he has no strength in his arms, but there is no pain. The pain is all located in his legs and back.

Q. What did your examination reveal, Dr. Marxer?

A. Well, the patient is a strongly built male, weighing 200 pounds, and is 5 feet 10 inches tall. The pupils are [282] equal and oval and react to light and accommodation. He was able to wrinkle his forehead, draw up the corners of his mouth and protrude the tongue in the midline. He has a full upper and lower plate. The patient is able to hear the whispered voice at a distance of 20 inches. He states the sore spot seems to be in the lower dorsal spine area, which is actually beginning just below the mid-back. The general outline of his back is satisfactory. He has a tendency, however, to carry his shoulders slightly forward.

(Testimony of John L. Marxer.)

The reflexes of the upper extremities are negative, except that the Hoffman test was positive on the left. On forward flexion he bends very slowly and states that he has pain when he bends down probably 50 per cent in the region of his right buttocks. Backward extension he bends as a rod. He states that it bothers his legs. Side bending, he doesn't bend, but he just swishes from one side to the other. The Romberg test was negative.

The knee jerks and ankle jerks were present and actually hyperactive. Plantar irritation gives a flexory response. Sensation to pin prick is normal and equal in both lower extremities, and also light touch. The patient states it does not feel like it used to. He sits on the edge of the table and completely extends his legs and states he has pain in his back.

Now, single leg-raising test on the right, he [283] raises it just about 20 degrees and then states it bothers him. On the left he can raise it up about 60 degrees and then it begins to bother him in his back, and he grunts with pain. Double leg-raising test even passively can only come up about 10 degrees, and it hurts him across his low back. Holding his knees together gives him pain in his back, but bending his ankles does not. Patrick's test on the left, the patient states he gets pain all across his low back, and on the right he gets pain across his low back, and states it starts in the center. The Gaenslen test was negative on the left, and on the right it bothers him over his low back. He has no

(Testimony of John L. Marxer.)

discomfort in the dorsal spine on doing any of these tests. With the patient lying on his abdomen and placing or, rather, just bending his knees gives him pain, he states, in his lumbar spine segment diffusely. Also placing the legs in a position of hyperextension—that is, in lifting the legs off of the table—and without maintaining that position he states gives him pain, diffuse, in the lumbar spine. He is hyperventilating at this time and breathing rather rapidly.

Q. Did you take any X-rays, Doctor?

A. We did.

Q. What did the X-rays reveal?

A. He had minimal arthritic changes in the region from [284] the sixth dorsal vertebra to the ninth dorsal vertebra, inclusive. This is very minimal. X-rays of the lumbar spine showed some narrowing of the facets between L-4 and L-5. That is in the low back. There is a transitional type vertebra of L-5, with an articulation between the transverse process and the sacrum on the right, and what appears to be a spina bifida on the fifth lumbar segment. The lateral view shows normal appearance of outline of the vertebral segments, with the most prominent arthritic spur between D-12 and L-1. There is some horizontality of the sacrum.

Q. Doctor, did the X-rays reveal any fracture or anything of that nature in the back?

A. They did not.

Q. Was the X-ray evidence essentially of an arthritic nature?

A. Yes, it was.

(Testimony of John L. Marxer.)

Q. Doctor, you mentioned three tests. The Hoffman test, I was wondering what that kind of test is?

A. Well, that is a test whereby we snap one of the fingers, usually the index finger, and the thumb comes up in an extended position.

Q. How about the Romberg test?

A. The Romberg was negative.

Q. What kind of a test is that? [285]

A. The Romberg test is a test for one of the lateral columns of the spinal cord. It means that they don't have co-ordination.

Q. That was negative?

A. That was normal.

Q. The last one was the Gaenslen test.

A. That is a test for the low back.

Q. That was negative, too?

A. Yes, it was negative, except on the right it bothered him diffusely over his low back.

Q. Would you tell me about the Hoffman test again. You say that was positive?

A. It was positive on the left.

Q. What does that mean? Will you demonstrate that, Doctor?

A. The test?

Q. Yes.

A. Well, the test is you snap a finger and the thumb just comes up in this position.

Q. I see. It was positive on one side?

A. It was positive on the left.

Q. At that time did you come to any impression or conclusion as to Mr. Swanson's condition?

A. Yes. I believe that this patient, from an

(Testimony of John L. Marxer.)

orthopedic point of view, has symptoms that are markedly exaggerated and way out of proportion to his findings. Actually, one [286] would say that his findings are normal for a man of his age and build, and with these varied and severe complaints one has to think of a psychopathic state. I do not believe that his symptoms today are primarily orthopedic in nature.

Q. Doctor, did you know at the time you made that examination in 1956 whether Mr. Swanson had recently, in January of that year, had a second operation to his head?

A. Yes, I did know that, in that he stated that the last time he was in the hospital in the history—I didn't know the date. At least, I didn't record the date.

Q. Dr. Marxer, did you see Mr. Swanson again at my request? A. I did.

Q. When was that?

A. I saw him again on January 9th, 1957.

Q. Leaving out the history, did he give you any different history this time or any different complaints that you know of from the time you first saw him?

A. Yes. He stated that since he was last examined he has started to lose his voice. Actually, the articulation relative to his voice seemed satisfactory. In other words, he articulated satisfactorily, but he states that he talks much more quietly now than he did previously. This has just occurred since he came out of the hospital the second time. The patient states that he was in the hospital the

(Testimony of John L. Marxer.)

second [287] time in January of 1956. He stated he was at St. Vincent's Hospital, and his head was operated on by Dr. Kloos. He states also that his hands, feet and lips have been cold ever since he was in the hospital the first time, which was February 9th, 1955.

Q. Did Mr. Swanson say anything at this time about his back?

A. He states that actually his back still bothers him, and he points to the right upper portion of his abdomen, and this goes right through into his back. Also, just above the symphysis pubis, which is the bony part of the pelvis, anteriorly from that point into his back. He has had no treatment for this condition since he was last seen, but he has had some physical therapy treatments at Providence Hospital under the direction of Dr. Howard Cherry. He doesn't recall when this was, however.

He states that some nights he sleeps pretty good and other nights he can sleep for only four hours and then he is unable to sleep any more. He doesn't actually have any pain, but it is just that he can't do anything about his sleeping. He says that if he lies down he feels much better.

Q. Did you make an examination of him the second time, Doctor?

A. Yes. His weight was the same. The pupils were equal [288] and oval, and they reacted to light and accommodation. The Romberg test was negative, and the other tests were negative as far as

(Testimony of John L. Marxer.)

the upper extremities were concerned. The Hoffman test at this time was negative.

Q. Was it negative on both sides on the second examination?

A. That is right. As far as his back is concerned, he points from approximately the ninth dorsal down to the lumbosacral junction as being the tender area. He stands erect. The crests of the ilium for all practical purposes are of equal height.

When bending forward normally he states he can feel it, but it doesn't hurt him. Bending backward was normal as to range, and he states that it is not painful, but he states that he can feel it. He actually bends somewhat as a rod. Side bending to the right and left is slightly limited, and he complains of pain at the lumbosacral junction. Rotation to the right and the left is normal as to range. This does hurt him, but he states that he can feel something in his low back.

Now, the reflexes of the lower extremities were normal. Actually, the patient doesn't want the bottom of his feet touched because he has always been extremely ticklish there. He actually refused to let me touch the bottom of his feet at that time, so I didn't do it. Sensation to light touch was normal and equal in both lower extremities, [289] and also sensation to pin prick was normal and equal in both lower extremities. The abdominal reflexes seemed to be working satisfactorily. Also, the cremasteric reflexes were satisfactory. In other words, the re-

(Testimony of John L. Marxer.)

flexes were normal. I didn't try for a Babinski at this time.

Q. Did you take any X-rays, Doctor?

A. We did.

Q. What do the X-rays show?

A. They show degenerative arthritic changes noted previously at the lumbo-dorsal junction, and a spina bifida occulta of the fifth lumbar spinous process, the same finding as shown originally.

Q. There was no change as to the arthritic condition?

A. There was no change. The arthritic condition was stationary.

Q. Did you form any impression at that time as to the man's orthopedic difficulties, Doctor?

A. From an orthopedic point of view one would say that there is probably some minimal strain to the lumbosacral junction, which I do not believe would be incapacitating to this person. I felt that he was a psychopathic personality and seemed to be primarily a neurological or psychiatric problem.

Mr. Roberts: Thank you, Doctor. [290]

Cross-Examination

By Mr. Morrison:

Q. You figure he is a case for treatment by psychiatrists or neurosurgeons now instead of for orthopedic surgery?

A. That is what I thought.

Mr. Morrison: That is all. No further questions.

(Witness excused.)

Mr. Roberts: That is the medical testimony for the defendants, your Honor.

The Court: Do you want to do some briefing?

Mr. Roberts: Your Honor, I would like to take a little time. I should have it ready for you by Thursday or Friday.

The Court: I don't want it so soon. Mr. Morrison is going to want to answer you. You take ten days, Mr. Roberts, and you take ten days, Mr. Morrison, and you take five to reply if you need them. That will leave me a couple of days to read the briefs, and I will hear you in argument on the 11th at 11:00 o'clock in the morning.

(Whereupon proceedings in the above matter were concluded.) [291]

Reporters' Certificate

We, the undersigned, John S. Beckwith, Official Reporter of the above-entitled Court, and William A. Beam, Official Reporter Pro Tem of the above-entitled Court, do hereby certify that we reported in shorthand the proceedings had in the foregoing matter, that we thereafter caused our respective shorthand notes to be reduced to typewriting under our direction, and that the foregoing transcript, consisting of Pages 1 to 291, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so reported by us in shorthand on the dates set forth in the foregoing transcript, and of the whole thereof; our respective portions being as follows:

Pages 1 to 150—William A. Beam

Pages 151 to 291—John S. Beckwith

Dated at Portland, Oregon, this 22nd day of April, 1957.

/s/ JOHN S. BECKWITH,
Official Reporter.

/s/ WILLIAM A. BEAM,
Official Reporter Pro Tem.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

Apr. 27—Filed petition for removal from Multnomah Co.

Apr. 27—Filed bond on removal.

Apr. 27—Filed notice of removal.

Apr. 29—Filed motion for order to bring in 3rd party defts.

Apr. 29—Filed and entered order to bring in 3rd party defts.

Apr. 29—Filed 3rd party complaint.

Apr. 29—Filed motion for order for service by Wm. F. Howell.

Apr. 29—Filed and entered order for service by Wm. F. Howell.

Apr. 29—Mailed summons for service to Wm. F. Howell for 3rd party def. Independent Stevedore Co.

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- Apr. 29—Issued summons on 3rd party def. Portland Stevedoring Co.—to marshal.
- May 2—Filed answer of defts. Matson Navigation Co. and Oceanic Steamship Co.
- May 2—Filed summons for 3rd party def. Portland Stevedoring Co. with marshal's return.
- May 5—Filed and entered order for service by M. F. Kelly.
- May 5—Mailed summons for 3rd party def. Independent Stevedore Co. to M. F. Kelly.
- May 18—Filed motion of 3rd party def. Portland Stevedoring Co. for more definite statement.
- May 19—Filed summons for 3rd party def. Independent Stevedore Co. with return.
- May 20—Filed motion of 3rd party def. Independent Stevedore Co. for more definite statement.
- May 31—Entered order reserving ruling on defts. Portland Stevedoring Co. and Independent Stevedoring Co.'s motions to the time of pretrial conference and order allowing 3rd party defts. 30 days in which to file 3rd party answers.
- June 8—Filed plaintiff's demand for jury trial.
- July 14—Filed deposition of Clarence Uskaski for defendants.
- July 22—Filed deposition of Guy W. Swanson.
- Aug. 2—Filed amended third party complaint.

1955

- Aug. 23—Filed answer of 3rd party defendants to amended 3rd party complaint.
- Oct. 31—Entered order setting for pretrial conference on Dec. 12, 1955.
- Dec. 12—Entered order setting for pretrial conference on Jan. 23, 1956.

1956

- Jan. 23—Entered order setting for trial on March 5, 1956.
- Jan. 23—Lodged pretrial order.
- Feb. 6—Filed notice of attorney's lien.
- Feb. 15—Entered order striking from trial on March 5, 1956.
- Feb. 27—Filed stipulation.
- Feb. 27—Filed and entered order allowing substitution of attorneys for plaintiff.
- Apr. 3—Filed motion for leave to file amended complaint.
- Apr. 16—Entered order allowing pltf. to file amended complaint.
- Apr. 16—Filed amended complaint.
- Apr. 19—Filed request for jury trial.
- May 10—Filed order allowing motion to file amended complaint.
- Oct. 8—Entered order setting for P.T.C. on Oct. 29, 1956.
- Oct. 29—Record of P.T.C.
- Oct. 29—Entered order setting for trial on Jan. 21, 1957.
- Dec. 13—Filed notice of withdrawal of plaintiff's request for jury trial.

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Dec. 24—Entered order that withdrawal of jury trial by pltf. be continued to date of trial.

Dec. 28—Entered order cancelling trial date of 1-21, and resetting on Feb. 5.

1957

Jan. 3—Issued 2 subpoenas—8 copies—to deft's. attys.

Feb. 4—Filed petition for issuance of subpoena duces tecum.

Feb. 4—Filed and entered order for issuance of subpoena duces tecum.

Feb. 4—Issued subpoena duces tecum handed to atty. Kenneth Roberts.

Feb. 4—Filed subpoena duces tecum with return on service by Kenneth Roberts.

Feb. 5—Filed and entered pretrial order.

Feb. 5—Record of Court Trial.

Feb. 6—Record of Court Trial.

Feb. 6—Entered order to hear remainder of medical testimony on Feb. 12th at 12:00 noon.

Feb. 6—Entered order allowing defts. to file brief on Feb. 13th and pltffs. to answer.

Feb. 6—Entered order setting for hearing on liability between Mr. Roberts and Mr. Woods on Thursday, Feb. 7th, at 9:30 a.m.

Feb. 7—Record of hearing on oral argument on liability between Matson Navig. Co. vs. Independent Stevedoring Co.

Feb. 7—Filed memo of authorities by Mr. Wood.

Feb. 12—Record of hearing of medical testimony.

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- Feb. 12—Entered order requesting Pltf. to file brief in 10 days. deft. 10 days and 5 days for Reply.
- Feb. 12—Entered order setting for oral argument on Mar. 11th at 11:00 a.m.
- Feb. 25—Filed defts and 3rd pty. plttf's. memo re liability of Oceanic to pltf.
- Feb. 25—Filed defts and 3rd pty plttf's' memo re liability of Stevedoring Companies.
- Mar. 5—Filed pltf's memo re liability of Oceanic Steamship Co.
- Mar. 11—Record of hearing on argument—decision reserved.
- Mar. 14—Filed and entered Findings of Facts and Conclusions of Law awarding plaintiff \$100,000—special damages \$12,053.60.
- Mar. 20—Filed obj. of Oceanic S.S. Co. to Pltfs'. Findings of Fact and Conc. of Law.
- Mar. 21—Entered order setting hearing on objections of Mr. Roberts. Oceanic S.S. Co., for Monday, Mar. 25th at 9:30 a.m.
- Mar. 22—Lodged Proposed Findings of Fact and Conclusions of Law of Oceanic S.S. Co.
- Mar. 25—Filed memorandum re excessiveness of damages.
- Mar. 26—Filed objections of Oceanic S.S. Co. to 3rd party defts. proposed Findings of Fact and Conclusions of Law.
- Mar. 27—Entered order overruling objections of Oceanic S.S. Co. to Pttf's'. Finding of Fact and Conclusion of Law.

1957

- Mar. 27—Filed and entered Judgment for plttf. and against Oceanic S.S. Co. (10:30 a.m.).
- Mar. 27—Filed and entered 3rd Party Defendants Findings of Fact and Conclusion of Law.
- Mar. 27—Filed and entered Judgment 3rd Party ptffs be non-suited as to 3rd party defds.—3rd party defts. have and recover costs and disbursements from 3rd party ptff. (2:30 p.m.)
- Apr. 1—Filed pltf's cost bill. (Costs taxed at \$87.04).
- Apr. 3—Filed motion to amend pursuant to Rule 5216 and/or for a new trial pursuant to rule 59 of the Federal Rules of Civil Procedure.
- Apr. 15—Filed memo in support of motion to amend Findings and Judgment or in the alternative for a new trial.
- Apr. 18—Record of hearing on motion—under advisement.
- Apr. 23—Filed transcript of proceedings (Feb. 5, 6 & 12, 1957).
- Apr. 23—Filed and entered order overruling motion of defts. Oceanic Steamship Co. to amend Findings of Fact and Alternative motion for a new trial.
- May 21—Filed notice of appeal by Oceanic Steamship Co.
- May 21—Filed bond for costs on appeal.
- May 22—Filed cost bill of 3rd party def. Portland Stevedoring Co.

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- May 22—Filed cost bill of 3rd party def. Independent Stevedore Co.
- May 23—Filed and entered order extending time for appeal 90 days.
- May 24—Costs of Portland Stevedoring Co. taxed at \$20.00.
- May 24—Costs of Independent Stevedoring Co. taxed at \$20.00.
- June 10—Filed stipulation as to record on appeal.
- June 10—Filed motion to transmit exhibits.
- June 10—Filed and entered order directing Clerk to transmit exhibits to Cir. Ct. Appeals.
- June 25—Filed satisfaction of Judgment by plttf.
- June 28—Filed satisfaction of attorneys' lien and release by William B. Murray & Donald R. Stark.
- July 3—Filed motion for order to pay funds out of Reg. of Court.
- July 3—Filed and entered Order that Clerk pay pltf \$90,000.00 out of Registry of Court.
- July 10—Filed receipt of Guy W. Swanson for \$90,000.00
- July 22—Filed statement of points upon which appellant intends to rely on appeal.
- July 22—Filed stipulation with respect to designation of portions of record to be printed.
- July 22—Filed stipulation with respect to printing of record.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pretrial order; Findings of fact and conclusions of law; Proposed findings of fact and conclusions of law of Oceanic Steamship Company, etc.; Proposed judgment; Third-party defendants' findings of fact and conclusions of law; Judgment; Judgment; Notice of appeal; Undertaking on appeal; Order extending time to docket appeal; Stipulation as to record; Stipulation re exhibits; Order to forward exhibits to Court of Appeals; Satisfaction of judgment; Stipulation with respect to printing of record; Statement of points upon which appellant intends to rely on appeal; Stipulation with respect to designation of portions of record to be printed on appeal; Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8074, in which Oceanic Steamship Company is a defendant and third-party plaintiff and appellant, and Independent Stevedore Company and Portland Stevedoring Company are third-party defendants and appellees; that the said record has been prepared by me in accordance with the stipulations of the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover the reporter's transcript of proceedings. Also plaintiff's exhibits 1, 2-B, 2-C, 2-E, 2-F, 2-G and 4; defendants' 41-A, 41-B, 41-C, 41-D, 45-A, 45-B, 46-A, 46-B and 56.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of August, 1957.

[Seal] R. DE MOTT,
Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15659. United States Court of Appeals for the Ninth Circuit. Oceanic Steamship Company, a Corporation, Appellant, vs. Guy W. Swanson, Independent Stevedore Company, a Corporation, and Portland Stevedoring Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



